Central Law Journal.

ST. LOUIS, MO., AUGUST 17, 1900.

The appellate division of the New York Supreme Court has recently rendered a decision wherein was upheld the right of labor unions to prevent the employment of laborers to whom they object. The controversy arose between two associations of steam-fitters, the National and the Enterprise. Members of the Enterprise Union went to several buildings on which members of the National Union were working and procured their discharge by threatening their employers. They told the employers that unless the National men were discharged, not only the Enterprise men, but also the members of other unions allied with them would quit work. As the employers were yielding to this threat, the National Union obtained an injunction restraining them, which the Supreme Court has now dissolved.

The court in rendering its decision said that it cannot be seriously questioned that every workman has the right in the first instance to say for whom and with whom he will work, and that an employer has the absolute right to say whom he will employ and the employee the right to say by whom he will be employed and with whom he will work.

The right, the court added, is reciprocal, and once it is destroyed, personal liberty is destroyed and chaos reigns. And if either employer or employee has this right when acting in an individual capacity he does not lose it when acting with others clothed with an equal right, so that employers may continue to say they will not employ persons who are members of labor organizations, and laborers may continue to say that they will not work for employers who engage any but members of labor organizations. The principle involved is the same when the question arises between rival labor organizations as when it arises between employer and employee. One may, the court said, by lawful means obtain employment either for himself or another, and may procure the discharge by lawful means of another person in order that he may obtain employment either for himself or another. This, the court added, was all that the association against which the injunction was granted did. It was seeking to obtain employment for its own members, and wherever it found places filled by members of the plaintiff association it procured their discharge in order that the employment might be given to its own members. As the case stands, action of the kind complained of does not fall within the cognizance of the courts.

This decision entirely destroys whatever vestige of the old conspiracy legislation intended to prevent combinations to raise wages, were to be found in the State of New York, and establishes the principle that an association of laborers may do whatever an individual may. It is, of course, entirely inconsistent with the law against combinations in restraint of trade, known as the anti-trust law, which makes it a crime to enter into any agreement that may prevent competition.

A recent decision of the Supreme Court of Iowa—State v. Garbroski—lays down the doctrine that under Const. art. 1, § 6, providing that all laws of a general nature shall have a uniform operation, and that the general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens. Code, § 1347, requiring all peddlars plying their vocation outside of any city or town to secure a license from the county auditor, and to pay a tax therefor, but specially exempting from the payment of such tax persons who have served in the Union army or navy, is unconstitutional and void, as an unreasonable classification. That this statute grants a privilege to persons who have served in the Union army and navy, not available to others, is manifest. This privilege, the court says, is not dependent upon a present situation or condition, nor on relations or circumstances suggesting the necessity or propriety of different legislation for the exempted class. The authorities generally recognize that, for the purposes of efficient and beneficial legislation, it is often necessary to divide the subjects upon which it operates into classes. As

said by Justice Field in Railway Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. Rep. 1161, 32 L. Ed. 107: "The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application." The extent to which division may be carried without running into special, or what is known as "class," legislation, is sometimes difficult to determine. All the authorities agree that the distinction in dividing may not be arbitrary, and must be based on differences which are apparent and reasonable. Thus, the Supreme Court of Minnesota, in Nichols v. Walter, 33 N. W. Rep. 800, declared: "The true, practical limitation of the legislative power to classify is that the classification shall be upon some apparent natural reason—some reason suggested by necessity; by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them." This was approved in Lavallee v. Railway Co. (Minn.) 41 N. W. Rep. 974. In Johnson v. Railway Co., 45 N. W. Rep. 157, 8 L. R. A. 419, the same court, through Mitchell, J., said: "It has sometimes been loosely stated that special legislation is not class, if all persons brought under its influence are treated alike under the same conditions. But this is only half the truth. Not only must it treat alike, under the same conditions, all who are brought within its influence, but in its classification it must bring within its influence all who are under the same conditions." In State v. Hammer, 42 N. J. Law, 439, the Supreme Court of New Jersey held that: "The true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as a basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction having reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects and places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation." The Supreme Court of Tennessee, in Sutton v. State, 36 S. W. Rep. 697, 33 L. R. A. 589, very tersely states the law to be that legislation to be constitutional and valid, "must possess each of two indispensable qualities: First, it must be so formed as to extend to and embrace equally all persons who are or may be in the like situation or circumstances, and, secondly, the classification must be natural and reasonable, and not arbitrary or capricious." To the same effect, see State v. Loomis, 115 Mo. 307, 22 S. W. Rep. 350, 21 L. R. A. 789; State v. Haun (Kan.), 59 Pac. Rep. 341; State v. Goodwill, 33 W. Va. 179, 10 S. E. Rep. 286, 6 L. R. A. 621; *Ex parte* Jentzsch (Cal.), 44 Pac. Rep. 803, 32 L. R. A. 665; City of Evansville v. State (Ind. Sup.), 21 N. E. Rep. 267, 4 L. R. A. 93; Magoun v. Bank, 170 U. S. 283, 18 Sup. Ct. Rep. 594, 42 L. Ed. 1037.

NOTES OF IMPORTANT DECISIONS.

MASTER AND SERVANT—LIABILITY OF MASTER FOR INJURIES TO THIRD PARTIES FROM ACTS OF STRANGER.—In Haines v. Atlantic City R. R., 46 Atl. Rep. 585, decided by the Supreme Court of New Jersey, it was held that where gates at a railroad crossing are raised by one not an employee of the railroad company, without authority from the gate keeper, and without his knowledge, while his back was turned for a moment, the railroad company is not liable for injuries to one crossing the tracks by the lowering of the gates. The court said in part:

"Cases which decide that a principal is responsible for the act of a stranger, where his servant employs some third person to perform an act within the scope of a servant's employment, and injury results to another, are inapplicable to this case. Simons v. Monier, 29 Barb. 419; Althorf v. Wolfe, 22 N. Y. 355; Wood, Mast. & Serv. Perrine, the company's gate man, neither employed Boggs nor knew that he was about to meddle with the gates. In Smith v. Railroad Co., the company left a loaded car, coupled with two empty cars, standing on a switch which inclined towards their main track, the same being secured by their brakes and a railroad tie placed under the wheels of the loaded car. The car got on the main track, and thereby an accident occurred, the plaintiff being injured. It was held that the company was not irresponsible, as a matter of law, even though the cars could not have gotten on the main track but for the wrongful act of a stranger. Chief Justice Beasley, in delivering the opinion of the court, used this language: 'Nor would it have been proper to have yielded to the request to tell the jury that the company

was not answerable if the collision was produced by the loosening of the car by the unlawful act of a stranger, for this would have been tantamount to saying that a railroad company has the legal right to have a loaded car on a plane inclining towards their track in such a condition that it is subject to become freed from its restraints by any unlawful intervention of human agency, though such intervention should be the mere result of accident. * * * I am not aware of any legal principle that would justify a railroad company in leaving loaded cars in such a situation that they could be caused to run onto its main track, in the way of its passing trains, by the carelessness of persons passing by or by the act of children playing near their switches.' 46 N. J. Law, 7, 12. It will be observed that in that case there was fault on the part of the company in leaving its loaded car on a switch inclining towards its main track, and liable to be sent down on the latter track. In the present case, so far as the acts of the company and of its servants are concerned, there was no fault in the raising or turning down of these gates. Nor are cases such as Exton v. Railroad Co., 62 N. J. Law, 7, 42 Atl. Rep. 486, where a railroad company was held liable for injuries from the acts and conduct of intruders or strangers, applicable in this litigation. Cases of this class rest upon the duty of the carrier to its passengers, and liability springs from the want of care to protect passengers from injury."

CONTRACT—IMPOSSIBILITY OF PERFORMANCE—RECOVERY FOR WORK DONE.—In Augus v. Scully, decided by the Supreme Judicial Court of Massachusetts, it was held that where plaintiffs had contracted to move a house, and had partially performed their contract when the house burned without their fault, they might recover for the work done. The court said:

'The contract was that the plaintiffs should move a large building belonging to the defendants from a lot on Third street to a lot on First street, and also change the location of two other buildings, of which one was on the First street lot, and one on the Third street lot; and the defendant was to pay them $840. In accordance with the agreement, the plaintiffs began the work. 'They first moved the house on the Third street lot, and then began to move the large building from the Third street lot across certain open lots towards the lot on First street. When said last-named building had been moved about half the distance to said lot on First street it was entirely consumed by fire at sometime during the night, and thereupon, with the assent of the defendant, no further work was done in moving either of the other buildings.' In this action the plaintiffs seek to recover the fair value of the services rendered by them in the work done down to the time of the fire. The court refused to rule as requested by the defendant, that the plaintiffs could not recover, and submitted the case to the jury upon instructions which would authorize them to find for the plaintiffs if they were satisfied that the fire was not attributable to any negligence of the plaintiffs. We see no error in the rulings under which the case thus went to the jury. Clearly, one of the implied conditions of the contract was that the building should continue to exist. Upon the destruction of the building, the work could not be completed according to the contract. Authorities differ as to the rights of the parties in such a case, but so far as respects this commonwealth the rule is well settled. As stated by Knowlton, J., in Butterfield v. Byron, 153 Mass. 517, 523, 27 N. E. Rep. 669, 12 L. R. A. 573: 'The principle seems to be that when, under an implied condition of the contract, the parties are to be excused from performance if a certain event happens, and by reason of the happening of the event it becomes impossible to do that which was contemplated by the contract, there is an implied *assumpsit* for what has properly been done by either of them; the law dealing with it as done at the request of the other, and creating a liability to pay for its value, to be determined by the price stipulated in the contract, or in some other way if the contract price cannot be made applicable.' Stated more narrowly, and with particular reference to the circumstances of this case, the rule may be said to be that where one is to make repairs or do any other work on the house of another under a special contract, and his contract becomes impossible of performance on account of the destruction of the house without any fault on his part, then he may recover for what he has done. This case comes clearly within this rule. Lord v. Wheeler, 1 Gray, 282; Butterfield v. Byron, *ubi supra*, and cases therein cited."

PRESUMPTION—DRAFT SENT BY MAIL—RECEIPT.—In Fleming & Ayrest Co. v. Evans, 61 Pac. Rep. 503, decided by the Court of Appeals of Kansas, it appeared that A inclosed a draft in an envelope which was properly stamped, and addressed to B at Chicago, Ill. A knew the street and number of B, but did not, so far as the evidence shows, place any address upon the envelope but A's name and the words "Chicago, Ill." It was held that the letter was not so addressed that a jury would be warranted in drawing an inference that it was actually received by B. The court said in part:

"It is true that a letter properly addressed, stamped, and deposited in the post office, is presumed to have been received by the person to whom it is directed. Perhaps it is more nearly accurate to say that the fact that a letter properly addressed is deposited in the post office, with postage prepaid, is *prima facie* evidence that the person to whom it is addressed received it, and that the inference based on the fact that letters usually reach their destination may be overcome by other evidence, it being a question for the jury. Mr. Carey, who was president of the Fleming & Ayrest Company of Chicago, testified that the account had not been paid. Upon the question as to whether or no the positive testimony of the party addressed, that he did not receive the

letter, is sufficient to overcome the presumption that the letter was in fact received, we find a conflict of opinion. The Supreme Court of Washington has held that such presumption is overcome by the direct testimony of the person to whom the letter is sent that it was not received (Ault v. Association, 47 Pac. Rep. 13), while the Supreme Court of Alabama has held that it is for the jury to determine whether the presumption is overcome by such evidence. Steiner v. Ellis (Ala.), 7 South. Rep. 803. We are inclined to favor the rule laid down in the Alabama case as being the better one, but do not base our decisions upon that question. The evidence shows that the draft was mailed by a Mr. West, who was the bookkeeper for defendants in error. West testified that he noticed the assignment stamped upon the invoice received by Evans & Thomas, and that he read the address of the Chicago company. The assignment was as follows: 'The above and foregoing account has been transferred by us to the Fleming & Ayrest Company of Chicago, to whom payment thereof is to be made, at 218 Home Insurance Building, Chicago, Ill. Fleming & Ayrest Company, Seattle, by E. A. Ayrest, Secretary.' In answer to the question 'What address did you put on the envelope?' West replied, 'Chicago, Ill.' We do not think that the letter was so addressed that the jury would be warranted in drawing an inference that it was actually received by the Fleming & Ayrest Company of Chicago. In a large city like Chicago, it frequently happens that there is more than one firm bearing the same name. It is a general custom in such a city to deliver mail to the street and number of the person addressed, and, if mail is not so addressed, it not frequently happens that it is not received by the person for whom it is intended. The presumption that a letter is received by the person to whom it is addressed should have some reasonable limitation placed upon it, and we do not think that evidence that a letter was simply addressed to Chicago, Ill., would be sufficient to support an inference that the letter was actually received. If the draft had been indorsed to the Fleming & Ayrest Company of Chicago, and inclosed in an envelope addressed to such company at 218 Home Insurance Building, Chicago, Ill., the question of payment would probably not have arisen."

SUNDAY LAW — BASEBALL—BREACH OF THE PEACE.—The Supreme Court of Michigan, decides in Scondale v. Sweet, 82 N. W. Rep. 1061, that games of baseball upon Sunday are prohibited by section 5912, Comp. Laws 1897, and are breaches of the peace under section 11,334; that it is the duty of the sheriff, as the chief police officer of the county, to suppress them, as unlawful assemblies, and to arrest the offenders; and that to charge a sheriff with an intentional neglect of duty is libelous *per se*. The court said in part:

"What is the legal character of the game of baseball played upon the Sunday in question? It is conceded to have been prohibited by section 5912, Comp. Laws 1897, which imposes a penalty of not to exceed $10 for such offense. It is an offense against the public peace, under section 11,334, which provides: 'If any person * * * to the number of thirty or more, whether armed or not, shall be unlawfully, riotously, or tumultuously assembled in any city, township or village, it shall be the duty of * * * the sheriff and his deputies to go among the persons so assembled, * * * and in the name of the people of the State, to command all the persons so assembled immediately and peaceably to disperse.' That this was an unlawful assembly is conceded. Was it a breach of the peace? The right of the State to enact laws for the observance of the Sabbath is beyond the domain of discussion. Nearly every law that has been passed upon the subject has been contested in the courts. Upon no subject is there a greater unanimity in judicial opinions. I find but one decision which has held such a law unconstitutional. *Ex parte* Newman, 9 Cal. 502. The opinion in that case was by a bare majority of the court, Justice Field dissenting. That decision was overruled by a unanimous opinion of the court in *Ex parte* Andrews, 18 Cal. 678. These laws do not infringe upon the religious freedom guarantied by the constitutions of the United States and of the various States. The statute carefully exempts those who conscientiously believe in the observance of the seventh day of the week, and who actually refrain from secular business and labor on that day. Whether they are enacted because of the necessity of a day of rest, or out of regard to the religious practices and beliefs of the people, or from both considerations, we need not consider. In view, however, of the notorious disregard of some of the provisions of these laws, and the notorious neglect of some sheriffs and other police officers to enforce them, a reference to some of the decisions may be pertinent. The State of Georgia enacted a law prohibiting the running of freight trains in that State on Sunday. It was attacked as conflicting with interstate commerce. The law was held valid; the court, speaking through Mr. Justice Harlan, saying: 'The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains,—domestic as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight. And it places the business of transporting freight in the same category as all other secular business. It simply declares that, on and during the day fixed by law as a day of rest for all the people within the limits of the State from toil and labor incident to their callings, the transportations of freight shall be suspended.' Hennington v. Georgia, 163 U. S. 299, 16 Sup. Ct. Rep. 1086, 41 L. Ed. 166. Chief Justice Kent, in 1811, in an indictment for

blasphemy, said: 'And why should not the language contained in the indictment be still an offense with us? There is nothing in our manners or institutions which has prevented the application or the necessity of this part of the common law. We stand equally in need now as formerly of all that moral discipline and of those principles of virtue which help to bind society together. The people of this State, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order. Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful.' People v. Ruggles, 8 Johns. 290. If the utterance of blasphemy is offensive to the virtuous part of the community, and injurious to the morals of the young, is not an open, boisterous, and flagrant violation of these laws equally offensive and dangerous? When citizens become a part of that civil compact known as the 'State,' and surrender certain of their natural rights, in consideration for which the same promises to protect their persons, property, health and morals, are they not entitled to have these laws enforced? Is it not demoralizing in the extreme when they are permitted to be openly defied with impunity? A leading case upon the subject is Lindenmuller v. People, 33 Barb. 548, which involved a statute prohibiting theatrical exhibitions on Sunday. In that opinion appears the following: 'It is exclusively for the legislature to determine what acts should be prohibited as dangerous to the community. The laws of every civilized State embrace a long list of offenses which are such merely as *mala prohibita*, as distinguished from those which are *mala in se*. If the argument in behalf of the plaintiff in error is sound, I see no way of saving the class of *mala prohibita*. Give every one his natural rights, or what are claimed as natural rights, and the list of civil offenses will be confined to those acts which are *mala in se*, and a man may go naked through the streets, establish houses of prostitution *ad libitum*, and keep a faro bank on every corner. This would be repugnant to every idea of a civilized government. It is the right of the citizen to be protected from offenses against decency and against acts which tend to corrupt the morals and debase the moral sense of the community. Regarding the Sabbath as a civil institution, well established, it is the right of the citizen that it should be kept and observed in a way not inconsistent with its purpose and the necessity out of which it grew,—as a day of rest, rather than as a day of riot and disorder, which would be effectually to overthrow it, and render it a curse rather than a blessing.' Under a statute which prohibited sporting, etc., on Sunday, baseball games were held to come within the definition of 'sporting.' State v. O'Rourk, 35 Neb. 614, 53 N. W. Rep. 591, 17 L. R. A. 830. The learned chief justice in that case used the following language: 'The law, both human and Divine, being thus in favor of abstaining from sporting, etc., on Sunday, is a reasonable requirement, and should be enforced. The deliberate violation of such a law, there is reason to believe, in many cases, is but the commencement of a series of offenses that lead to infamy and ruin; and, in any event, the influence upon the participants themselves, has a tendency to break down the moral sense and make them less worthy citizens. The State has an interest in their welfare, and may prevent their violation of the law. The State, in order to prevent vice and immorality, may punish licentiousness, gambling of all kinds, the keeping of lotteries, enticing minors to gamble, or to permit one under eighteen years of age to remain in the billiard room; to punish publishing, keeping, selling, or giving away any obscene, indecent, or lascivious paper, book or picture, and also punish any person who shall lend or show to any minor child any such paper, publication, or picture, etc. The law also punishes the disturber of a religious meeting, school meeting, election, etc. These cases show the importance felt by the legislature of evils of the kind named, and others, by means of which, in addition to wrongs inflicted on the persons injured, a spirit of insubordination is created and fostered, which incites to evil, and tends to subvert the just and equal rights of some or all. In addition to this, every person has a right to the quiet and peace of a day of rest. He has also a right to the enforcement of the law, so that the evil example of a defiance of the law shall not be set before his children. The State has an interest in their welfare, also, in order that they may become useful citizens, and worthy and honorable members of society. The fact that the defendants were some distance away from the residence of any person can make no difference. It did not change the nature of the offense, nor excuse the act. It was a violation of the law, just the same.' See, also, State v. Hogriever (Ind. Sup.), 53 N. E. Rep. 921, 45 L. R. A. 504; State v. Powell, 58 Ohio St. 324, 50 N. E. Rep. 900, 41 L. R. A. 854; People v. Havnor, 149 N. Y. 195, 43 N. E. Rep. 54; 31 L. R. A. 689; People v. Bellet, 99 Mich. 151, 155, 57 N. W. Rep. 1094, 22 L. R. A. 696. In 1820 the territorial legislature of Michigan passed an act entitled 'An act to enforce the observation of the Sabbath.' Its preamble is as follows: 'Considering that in every community, some portion of the time ought to be set apart for relaxation from worldly labors and employments, and devoted to the social worship of Almighty God, and the attainment of religious and moral instruction, which are in the highest degree promotive of the peace, happiness and prosperity of a people; and whereas the first day of the week,

commonly denominated the Sabbath, has at all times among Christians in general, been devoted to these important purposes; to the end therefore, that the good people of this territory may be enabled, as well on that day, as on all proper occasions, freely and without disturbance, to perform those great and necessary duties with that decency and solemnity, which is suitable to their importance, therefore,' etc. The law then enacted is substantially the same as that now upon the statute book. A breach of the peace is 'a violation of public order; the offense of disturbing the public peace. An act of public indecorum is also a breach of the peace.' Bouv. Law Dict. The term is generic, 'and includes unlawful assemblies.' 4 Am. & Eng. Enc. Law (2d Ed.), 903. Where the statute prohibits the arrest of any person on Sunday, except in cases of treason, felony, and breaches of the peace, a ball game upon Sunday was held to be a breach of the peace. *In re* Carroll, 12 Wkly. Law Bul. 9. Under our statute and under the authorities referred to, this game of baseball was a breach of the peace."

MUNICIPAL LIABILITY FOR BREACH OF PUBLIC DUTIES.

There are two classes of municipal corporations: Strictly public or *quasi* corporations, and municipal corporations proper. To the former belong counties, townships, road districts, school districts, the New England towns and every other municipality which has no private or *quasi* private character. To the latter belongs cities, towns and villages, and every other municipality which has a private or *quasi* private character. Upon the former rests no legal duty to discharge its functions, in the sense of that which implies a correlative right in one to whom the duty is due. Upon the latter rests the legal duty to discharge such of its functions as are not, from their nature or by express provision of law, made discretionary; a duty of perfect legal obligation, implying a correlative legal right in the beneficiary thereof and giving rise to an actionable wrong whenever that duty is broken and a right thereby invaded.[1] In the decisions of the courts this distinction is seldom clearly drawn but, in all cases, logically exists. No matter that the nature of the duty is exactly the same in each class of municipalities, *e. g.*, a public duty (the duties of *quasi* corporations are always public), such as keeping in repair and improving public highways, abating and removing nuisances and preserving the public peace. Naturally, the inquiry has often been made: Why this distinction in the liability of the two classes of municipalities in respect of the discharge of public duties of exactly the same kind? And great minds, otherwise usually very clear, have expressed doubts as to the logic of the distinction. Thus, Judge Dillon, in his greatest work,[2] finds this distinction—which gives an action if the injury happens within the limits of a city or town and denies it if an injury of the same kind happens within the limits of a township or county possessing the same powers for its prevention—"not as satisfactory to the mind as could be desired." Yet we believe the distinction will be found to have been based upon sound and satisfactory reasons, when those reasons are perceived and understood.

The distinction exists, not in the nature of the duty to be performed in any case, but in the distinguishing nature of each class of municipalities. *Quasi* corporations have none but public or governmental duties to perform. They exercise no powers and enjoy no privileges as private or *quasi* private corporations. They do not voluntarily apply for any private or local corporate privileges or advantages and receive none. They are incorporated without the consent of their constituent members, and are limited in their powers of taxation and control of persons and property within their limits to that which is essential to the discharge of these public or governmental functions. They are purely and simply agencies of the State creating them; and to subject them to suits not authorized by statute would be equivalent to subjecting the State to such suits; and the sovereignty may never be sued without its consent. There is no legal duty resting upon the sovereign, in the sense of that which implies a correlative right in the subject. Therefore, no rule of law is better settled than that such a municipality can commit no actionable wrong and, hence, can never be held liable for negligence or malice in the absence of a

[1] Barnes v. District of Columbia, 91 U. S. 540, 23 L. Ed. 440, 443; City of Denver v. Dunsmore, 7 Colo. 328, 3 Pac. Rep. 705, 706; Town of Waltham v. Kemper, 55 Ill. 346, 8 Am. Rep. 652; Cones v. Board of Comrs., 137 Ind. 404, 37 N. E. Rep. 272, 273; Oklahoma A. and M. College v. Willis, 6 Okla. 593, 52 Pac. Rep. 921.

[2] 2 Dillon, Munic. Corp., sec. 998.

statute imposing such liability.[3] Municipal corporations proper, upon the voluntary solicitation of their constituent members, are usually invested with many of the essential attributes of private corporations; and, in addition thereto, they are granted innumerable privileges and advantages pertaining to their local and corporate interests the exercise of which are discretionary. Upon them are conferred the sovereign powers of taxation, eminent domain and legislative and administrative control of persons and property within their limits to the extent necessary to carry out and enjoy all of the privileges and advantages granted. They are also granted the power to perform certain public or governmental duties like those exclusively delegated to *quasi* corporations. By far the greater part of the powers they are given to execute pertain solely to their local interests and corporate benefits; but some also pertain to the public interests, such as the repair of public highways, the abatement of public nuisances and the preservation of the public peace; and those powers which concern alone the local and corporate interests are discretionary, whilst those which concern also the public interests are mandatory, though all are permissive in terms. The character of such a municipality being *quasi* private and local, as to the exercise of such powers as are mandatory, it does not come within the rule of exemption from liability as an arm of the sovereign, but is under a legal duty of perfect obligation to exert diligence and refrain from malice in the execution thereof, and a breach of this duty invades a correlative legal right, from which springs an actionable wrong in favor of any person who suffers a special injury.[4]

Concerning these non-discretionary powers of municipal corporations proper, the Court of Appeals of New York[5] has well observed: "Where a public body is clothed by statute with power to do an act which concerns the public interests, the execution of the power may be insisted on as a duty, though the statute conferring it be only permissive in terms." And again, in another case:[6] "The surrender by the government to the municipality of a portion of its sovereign power, if accepted by the latter, may with propriety be considered as affording ample consideration for an implied undertaking, on the part of the corporation, to perform with fidelity the duty which the charter imposes. Upon investigation it will be found that, from the earliest period of the common law, all grantees of franchises, whether individuals or corporations, have been held by a uniform and unbroken series of decisions to the strictest performance of every condition of the grant, either express or implied." The Supreme Court of New York, in an early case,[7] well expressed the same view: "This statute is one of public concern, relating exclusively to the public welfare; and though permissive merely in its terms, it must be regarded, upon well settled rules of construction, as imperative and peremptory upon the corporation. When the public interest calls for the execution of the power thus conferred, the defendants are not at liberty arbitrarily to withhold it. The exercise of the power becomes then a duty, which the corporation is bound to fulfill." Also the Supreme Court of Maryland well states the rule:[8] "It is a well settled principle that when a statute confers a power upon a corporation to be exercised for the public good, the exercise of the power is not merely discretionary, but imperative, and the words 'power and authority,' in such case, may be construed 'duty and obligation.'" And again, in the same case: "The people of Baltimore, in accepting the privileges and advantages conferred by their charter, took them subject to the burdens and restrictions which were made to accompany them under the same charter." Said the Supreme Court of Colorado,[9] after a thorough and searching examination of all of the previous decisions on this point: "The basis of the recovery in these and similar cases seems to have been

[3] Town of Waltham v. Kemper, 55 Ill. 346, 8 Am. Rep. 652; Cones v. Board of Comrs., 137 Ind. 404, 37 N. E. Rep. 272, 273.

[4] Conrad v. Trustees of Ithaca, 16 N. Y. 158, 171; City of Denver v. Dunsmore, 7 Colo. 328, 3 Pac. Rep. 795, 708; City of Guthrie v. Swan, 5 Okla. 779, 51 Pac. Rep. 562.

[5] Hutson v. Mayor, etc. of New York, 9 N. Y. 163, 168.

[6] Conrad v. Trustees of Ithaca, 16 N. Y. 171.

[7] Mayor, etc. of New York v. Furze, 3 Hill (N. Y.), 612, 614.

[8] Mayor, etc., of Baltimore v. Mariott, 9 Md. 160, 66 Am. Dec. 326.

[9] City of Denver v. Dunsmore, 7 Colo. 328, 3 Pac. Rep. 705, 708.

that the privileges and emoluments granted by the charters constituted a consideration for the performance of the duties imposed upon the corporations, and by the voluntary acceptance of the charters the corporations had bound themselves in the nature of a contract to the performance of such municipal duties. * * * The grant and the acceptance of franchises from the government, whether by individuals or corporations imposed upon the grantee the duty of performing all the conditions upon which it is issued, whether such conditions were expressly stated in the grant, or arose by necessary implication as the consideration of the grant." The Supreme Court of Illinois, upon the same principle, in a recent decision,[10] quoted with approval the following language of the Supreme Court of Pennsylvania:[11] "Under our political system, the State grants a portion of its sovereignty to certain municipalities. It clothes them with certain of its powers and exacts from them, in return, the performance of certain duties. * * * The privileges conferred must be taken with such burdens as the law-making power chooses to annex thereto." The Supreme Court of the United States[12] applied the same principle in the following language: "Where such a duty of general interest is enjoined, and it appears, from a view of the several provisions of the charter, that the burden was imposed in consideration of the privileges granted and accepted, and the means to perform the duty are placed at the disposal of the corporation, or are within their control, they are clearly liable to the public if they unreasonably neglect to comply with the requirement of the charter; and it is equally clear, when all the foregoing conditions concur, that, like individuals, they are also liable for injuries to person or property arising from neglect to perform the duty enjoined, or from negligence and unskillfulness in its performance. At one time it was held that an action on the case for a tort could not be maintained against a corporation; and, indeed, it was doubted whether *assumpsit* would lie against a corporation aggregate, since it was said the corporation could only bind itself under seal; but courts of justice have long since come to a different conclusion on both points." The same great court in a later case,[13] referring to the ground of liability of a municipal corporation proper to discharge a public duty thus imposed upon it, observed: "We do not regard its acts as sometimes those of an agency of the State, and at others those of a municipality, but that, its character and nature remaining at all times the same, it is great or small according as the legislature shall extend or contract the sphere of its action. * * * And here a distinction is to be noted between the liability of a municipal corporation, made such by acceptance of a village or city charter, and the involuntary *quasi* corporations known as counties, towns, school districts, and especially the townships of New England." Perhaps the most comprehensive expression of the reasons of the distinction under consideration is to be found in the following language of the Supreme Court of Illinois,[14] overruling the contrary doctrine of an earlier case: "In the consideration given that case, the distinction was not drawn, which seems to have been acknowledged by some courts, between corporations, such as cities created for their own benefit, and towns established by law as civil divisions of a county, merely, and in which the inhabitants had no agency or participation. The former are held to stand upon the same ground as individuals, and have no exemptions from liability except such as may be given them by their charters. The reason for the distinction is adverted to by this court in Browning v. City of Springfield, 17 Ill. 143, and it is this: that municipalities by voluntarily accepting their charters, impliedly contract on their part to perform all the duties imposed on them, and they are made of perfect obligation by being clothed with all the power and authority necessary to their full performance; and, in this respect, there is no difference between such a corporation and a private corporation or individual, who has received from the sovereign power a valuable grant, charged with conditions. * * * In the case of these *quasi* corporations, made so without their consent, duties may be imposed, and

[10] City of Chicago v. Manhattan Cement Co., 178 Ill. 372, 58 N. E. Rep. 68, 69.

[11] Allegheny County v. Gibson, 90 Pa. St. 397.

[12] Weightman v. Washington, 1 Black (U. S.), 39, 17 L. Ed. 52, 57.

[13] Barnes v. District of Columbia, 91 U. S. 540, 23 L. Ed. 440, 441.

[14] Town of Waltham v. Kemper, 55 Ill. 346, 8 Am. Rep. 652.

their performance compelled under penalties; but the corporators who are made such *nolens volens*, are not, and cannot be considered, in the light of persons who have voluntarily and for a consideration assumed obligations, so as to owe a duty to every person interested in the performance. * * * The reason which exempts these public bodies from liability to private actions, based upon neglect to perform a public duty, does not apply to villages, boroughs and cities, which accept special charters from the State. The grant of the corporate franchise, in those cases, is usually made only at the request of the citizens to be incorporated, and it is justly assumed that it confers a valuable privilege, and which is held to be a consideration for the duties imposed by the charter. By those charters larger powers of self-government are conferred than those confined to towns or counties; larger privileges in the acquisition and control of corporate property, and special authority is given them to make use of the public highways for the special and peculiar convenience of the citizens of the municipality in various modes not permissible elsewhere. These grants raise an implied promise on the part of the corporation to perform their corporate duties, and it inures to the benefit of every individual interested in its performance."

The cases quoted from and others which proceed upon the same principle may be grouped in three principal classes with reference to the nature of the public duty imposed upon the municipality; where the duty is to keep in repair public streets and sidewalks,[15] where the duty is to abate and remove public nuisances,[16] and where the duty is to preserve the public peace.[17] Notwithstanding the apparent unanimity of reason in the cases cited, a number of the most respectable courts unfortunately have not recognized this notable distinction between strictly private or *quasi* corporations and municipal corporations proper as to liability for breach of public duties; and, therefore, it has been held that, as to such duties, municipal corporations proper are agencies of the government, the same as *quasi* corporations; that, according to the nature of the duty concerned, they are sometimes strictly public or *quasi* corporations and sometimes municipal corporations proper, and that in their former capacity they can never be held liable for negligence or malice.[18]

FRANCIS J. KEARFUL.

[The Supreme Court of the Territory of Oklahoma, in Wallace v. Town of Norman, 60 Pac. Rep. 108, has lately held contrary to the views of the writer and the decisions from which he quotes. None of those decisions are distinguished or even cited in the Wallace case, and the only citation is Western College v. City of Cleveland, 12 Ohio St. 375, for which reason the decision is not as satisfactory as might be desired. The point involved is unusually interesting. Wallace, a white contractor, was injured by a mob because he brought into the town in his employ a colored laborer; and the mob acted with the sympathy of most of the inhabitants and the active co-operation of the municipal authorities, pursuant to a conspiracy which had existed unsuppressed since the beginning of the town, having for its purpose the absolute exclusion of negroes from the corporate limits, and pursuant to which many acts of violence had been committed with the connivance of the municipal authorities. The municipal duty to suppress this most

[15] Weightman v. Washington, 1 Black (U. S.), 39, 17 L. Ed. 52; Barnes v. District of Columbia, 91 U. S. 540, 23 L. Ed. 440; City of Denver v. Dunsmore, 7 Colo. 328, 3 Pac. Rep. 705; Jansen v. City of Atchison, 16 Kan. 358, 380; Hutson v. Mayor, etc. of New York, 9 N. Y. 163; Conrad v. Trustees of Ithica, 16 N. Y. 158; City of Guthrie v. Swan, 5 Okla. 779, 51 Pac. Rep. 562.

[16] City of New Albany v. Slider, 21 Ind. App. 392, 52 N. E. Rep. 626; City of Tallahassee v. Fortune, 37 Fla. 19, 52 Am. Dec. 358; Gould v. City of Topeka, 32 Kan. 485, 4 Pac. Rep. 822; City of Kansas City v. McDonald, 60 Kan. 481, 57 Pac. Rep. 123; Clayton v. City of Henderson (Ky), 44 S. W. Rep. 667; Mayor, etc. of of Baltimore v. Mariott, 9 Md. 160, 66 Am. Dec. 326; Moore v. Townsend (Minn.), 78 N. W. Rep. 880; Conrad v. Trustees of Ithaca, 16 N. Y. 158; Spier v. City of Brooklyn, 139 N. Y. 6, 34 N. E. Rep. 727; Dillon v. City of Raleigh (N. Car.), 32 S. E. Rep. 548; Little v. City of Madison, 42 Wis. 643, 24 Am. Rep. 435.

[17] Taylor v. Mayor, etc. of Cumberland, 64 Md. 68 20 Atl. Rep. 1027; Cochrane v. Mayor, etc. of Frostburgh, 81 Md. 54, 31 Atl. Rep. 703; Speir v. City of Brooklyn, 139 N. Y. 6, 34 N. E. Rep. 727; Little v. City of Madison, 42 Wis. 643, 24 Am. Rep. 435.

[18] City of Arkadelphia v. Windham, 49 Ark. 139, 4 S. W. Rep. 450; Winibigler v. Mayor, etc. of Los Angeles, 45 Cal. 36; Hewison v. City of New Haven, 37 Conn. 475, 9 Am. Rep. 342; Hill v. Boston, 122 Mass. 344; Detroit v. Blakeby, 21 Mich. 84, 4 Am. Rep. 450; Pray v. Mayor, etc. of Jersey City, 32 N. J. L. 394; Young v. City of Charleston, 20 S. Car. 116, 47 Am. Rep. 827; City of Navasota v. Pearce, 46 Tex. 525

abominable public nuisance was imposed by statute and admitted by the court to exist, and the town was a municipal corporation, properly invested with all necessary powers for the performance of the duty, yet it was held that the failure to diligently discharge this duty gave no action to Wallace, who had, because of such failure, suffered a special injury. The public welfare would seem to demand that this case be decided by the Supreme Court of the United States, and its decision will be awaited with much interest.—ED.]

GAS COMPANY—RULES—FAILURE TO PAY BILLS—DISCONTINUING SERVICE —MANDAMUS.

MACKIN v. PORTLAND GAS CO.

Supreme Court of Oregon, May 28, 1900.

1. The defendant gas company was operating under a franchise to supply gas to the inhabitants of a city. Plaintiff, who has signed an order for gas, consenting to a rule of the company that the gas would be shut off in default of payment, refused to pay a bill for gas furnished at a certain place. After he had moved to another place, the company furnished gas for a time, but discontinued his supply on his refusal to pay the former bill. Held that *mandamus* would not lie to compel the company to supply gas to plaintiff till the former bill was paid.

2. A peremptory writ of *mandamus* to compel a gas company, which has cut off the gas from plaintiff's premises for his failure to pay a former bill, to continue such a supply, will not issue by reason of the fact that the alternative writ and answer show that there is a controversy concerning the correctness of such bill, as the right to the writ must be clearly established before it will issue.

BEAN, J. (after stating the facts): The only question on this appeal is whether the court below erred in sustaining the demurrer to defendant's answer, and ordering a peremptory writ. Briefly, the facts are that in March, 1897, the plaintiff purchased gas of the defendant for use at No. 284 Morrison street, under a contract which provided that, in default of the regular payment of a bill, the company would discontinue the supply until payment should be made. Some time in that month he quit using the gas, and left, as the defendant alleges, an unpaid bill of $5.25. Thereafter, and in September, 1899, he again applied to the company for gas to be used at 107 Fourth street, and it was furnished him up to November 11th, when he was notified by the defendant that unless he paid the old bill it would be discontinued. This he refused to do, and the company cut off the gas. Upon these facts, the inquiry is whether the plaintiff is entitled to a writ of *mandamus* to compel the defendant to turn on the gas.

The right of a court to compel by *mandamus* a company engaged in furnishing gas for general consumption to supply all persons along its main or conduits who offer to and do comply with its rules and regulations is undoubted and unquestioned. Haugen v. Water Co., 21 Oreg. 411, 28 Pac. Rep. 244; State v. Nebraska Tel. Co., 17 Neb. 126, 22 N. W. Rep. 237; Crumley v. Water Co., 99 Tenn. 420, 41 S. W. Rep. 1058; Shepard v. Light Co., 70 Am. Dec. 479, and note; 27 Am. Law Reg. 277. And the authorities are agreed that such a company may adopt and enforce whatever reasonable rules and regulations may be necessary to protect its interests, which would include one providing that the supply of gas may be discontinued if a customer fails or neglects to pay his bills when due. American Waterworks Co. v. State, 46 Neb. 194, 64 N. W. Rep. 711, 30 L. R. A. 447; State v. Sedalia Gaslight Co., 34 Mo. App. 501; Tacoma Hotel Co. v. Tacoma Light & Water Co., 3 Wash. St. 316, 28 Pac. Rep. 516, 14 L. R. A. 669.

The contention for the defendant is that, under its rules in force at the time the contract was made with the plaintiff, and which became a part of the contract, it had a right to discontinue the supply of gas to a customer at one set of premises until payment of a delinquent bill for gas furnished him at another, and in this we think it is supported by the authorities. The cases of People v. Manhattan Gaslight Co., 45 Barb. 136, and Gas Co. v. Cadieux (1899), App. Cas. 589, are in point. In the former it appears that the relator commenced taking gas in 1858 at No. 61 Seventh avenue, and was supplied with same until the 28th of December, 1861. He paid his bills up to the 19th of August, 1861, but not thereafter. In May, 1864, he applied for gas at No. 121 West Sixteenth street, which was furnished without objection on account of the former indebtedness until the 9th of February, 1865, when the company shut off the supply, and refused to furnish any more because of his failure to pay the balance due for gas furnished at No. 61 Seventh avenue. A judgment denying an application for a *mandamus* requiring the defendant to supply gas at No. 121 West Sixteenth street was affirmed. In Gas Co. v. Cadieux the statute defining the powers of the gas company provided that "if any person * * * supplied with gas by the company shall neglect to pay any rate, rent, or charge due to the * * * company at any of the times fixed for the payment thereof it shall be lawful for the company * * * on giving twenty-four hours' previous notice to stop the gas from entering the premises, service pipes, or lamps of any such person * * * by cutting off the said service pipe or pipes, or by such other means as the company shall think fit." The respondent was a customer of the company. He had two sets of premises in Montreal,—No. 1125 Notre Dame street, and No. 282 St. Charles Borromee street,

where he resided,—and took gas for both. The company cut off the supply from No. 1125 Notre Dame street for non-payment of the bill for gas furnished to that house. This measure had no effect in producing payment, whereupon the company gave notice that unless the other bill was paid it would cut off the gas at his residence, and, after repeated notices to that effect, carried its threats into execution, and cut off the gas at his residence as well as at No. 1125 Notre Dame street; whereupon he brought an action to compel it to continue the supply of gas at his residence, and, upon appeal to the privy council, it was held that he was not entitled to the relief demanded. In the opinion it is said: "The only question is a question of fact. Is the respondent, in the words of the act, a person supplied with gas by the company who has neglected to pay a rate, rent, or charge due to the company at the time fixed for the payment thereof? It cannot be disputed that he is. The occasion, therefore, has arisen which authorizes the company to stop the gas from entering his service pipes. There is nothing in the act to limit the right of the company to the service pipes of the defaulter in a particular building, or connected with a particular meter, in respect to which the default has been committed. There is nothing in the act to throw the rate, rent, or charge for gas upon the premises for which the supply is furnished, or to make it payable out of the premises of the defaulter. The supply is to the consumer, and the default is the consumer's default. His liability to the company is a liability for the whole of the debt which he owes them at the time." This argument seems particularly applicable to the rule of the defendant. There is nothing in it limiting the right of the company to shut off the gas to the particular building in which default has been committed, but the provision, in effect, is that, in default of the regular payment of a bill by a customer of the company, it will not supply gas to him until payment is made. The cases principally relied upon by plaintiff are distinguishable from the one at bar. Wood v. City of Auburn, 87 Me. 287, 32 Atl. Rep. 906, 29 L. R. A. 376, was a suit to enjoin the defendant from cutting off the supply pending a judicial investigation; and, besides, in that case, and also in State v. Neb. Tel. Co., *supra*, there was no rule of the company or stipulation in the contract providing for shutting off the supply in default of payment of bills. In Gaslight Co. v. Colliday, 25 Md. 1, the contract provided that gas should be introduced into the premises described, "and that in default of payment for gas consumed in said premises the flow of gas shall be stopped until the bill is paid," etc., and the court very naturally held that under such rule the company could not shut off the supply at one building on account of a default in payment for gas furnished another. Lloyd v. Gaslight Co., 1 Mackey, 331, was also based upon the construction given by the court to the contract between the company and the consumer. If, therefore, we take the allegations of the answer to be true (as we are bound to do on this appeal), the defendant, under its rules and the terms of the contract, had a right to refuse to supply the plaintiff with gas at No. 107 Fourth street, because he had made default in payment for gas previously furnished to him at other premises.

The plaintiff contends, however, that, taking the alternative writ and the answer together, it appears that there is an honest controversy between the company and the plaintiff concerning the bill for gas furnished at No. 284 Morrison street, and the defendant had no right or authority to cut off the supply in order to coerce the payment of the disputed bill. But this is an application for a peremptory writ of *mandamus*, and to entitle plaintiff to the relief demanded his right must be clear. If he has paid or tendered payment of the rates legally due, he is entitled to the writ; otherwise, not. People v. Green Island Water Co., 56 Hun, 76, 9 N. Y. Supp. 168. It is said to be well settled that a court of equity will, in cases of this character, prevent by injunction the shutting off of the supply pending the determination of a dispute between a customer and the company. 27 Am. Law Reg. 283; Sickles v. Gaslight Co., 64 How. Prac. 33; Wood v. City of Auburn, *supra*. But a *mandamus* is an affirmative remedy, and before a peremptory writ will issue the plaintiff's right must be clearly established. 2 Spell. Extr. Relief, sec. 1386; American Waterworks v. State, 31 Neb. 445, 48 N. W. Rep. 64; State v. Town Board of Sup'rs, of Delafield, 69 Wis. 264, 34 N. W. Rep. 123. We are of the opinion, therefore, that the court below erred in sustaining the demurrer to the answer. The judgment is reversed and the cause remanded for such further proceedings as may seem proper, not inconsistent with this opinion.

NOTE.—*Right of Gas Companies to Discontinue the Supply of Gas for Non payment of a Disputed Bill.*—The laws regulating the operation of public utilities for which a public grant or franchise is necessary, and which are generally in the nature of monopolies, controlled by *quasi* public corporations, are to be strictly construed against the corporation and in favor of the public. In this respect there is a great difference between *quasi* public and strictly private corporations. The *quasi* public corporation controls a public necessity, such as the supply of water or gas or the means of transportation and communication. The safety and convenience of every citizen depend upon their safe, continuous, and impartial operation. They have not the same right with a private corporation to interrupt the operation of their business at their own pleasure, or to serve one person and decline to serve another at their own discretion, or to favor one with terms more advantageous than they do another. Bearing in mind these general principles, the solution of many otherwise difficult problems connected with the operation of public franchises, will be more clearly evident.

It is a general rule, supported by every consideration of sound reason, and uncontradicted by authority,

that a gas company, enjoying a franchise and occupying the streets of a town or city, owes it as a duty to furnish gas to those who own and occupy houses on such streets where such owners or occupiers make the necessary arrangements to receive it, and comply with the reasonable regulations of such company; and if the company neglects and refuses to perform such duty it may be compelled to do so by writ of *mandamus*. Portland Gas Co. v. Keen, 135 Ind. 54. While it is true that gas companies have the right to make all necessary rules and regulations for the safe and profitable conduct of their business, still such rules must be reasonable and not burdensome to the consumer. This latter consideration often raises questions of considerable difficulty. Where the return of an alternative writ of *mandamus*, demanding a gas company to furnish the relator with gas, set out his refusal to pay a monthly rental upon and for the use of the meter furnished by the company, of $1.25 per month, in accordance with a rule of the company imposing such a payment in all cases where the consumer consumes less than 500 feet of gas, and which rental was to be taken in full for such gas not exceeding 500 feet in any one month, held, such rule was not unreasonable. State v. Sedalia Gas Light Co., 34 Mo. App. 506. In this case the court said: "It is a well understood principle that corporations so engaged as the appellant gas company may in its dealings with the people adopt and enforce such reasonable and just rules and regulations as may be necessary to protect its interests and further the designs of its incorporation. They have such power, too, without an express grant to that effect. It is an inherent power implied from the nature of the business in which they are engaged, limited only by express statute or ordinance, or by a sense of what is right, reasonable and just." To same effect see Wendall v. State, 62 Wis. 300. A regulation adopted by a gas company authorized the company by its inspector to have free access at all times to buildings and dwellings, to examine the whole gas apparatus, and for the removal of the meter and service pipes. It was held that the company could not require an applicant for gas to subscribe to this regulation, as a condition precedent to being supplied therewith. Shepard v. Milwaukee Gas Co., 6 Wis. 539. In this case the court said: "The fact of this exclusive right conferred upon the company to manufacture and sell gas in the city, to be consumed therein by citizens thereof, would imply an obligation on the part of the company to furnish the citizens of the city with a reasonable supply on reasonable terms. A gas company with exclusive rights to manufacture and sell gas is not a mere private corporation for the manufacture and sale of a commercial commodity. Gas is not a commercial commodity. It is not in its nature interchangeable, but merely consumable, and consumable only at the place of delivery. Odious as were monopolies to the common law, they are still more repugnant to the genius and spirit of our republican institutions, and are only to be tolerated on the occasion of great public convenience or necessity. And they always imply a corresponding duty to the public to meet the convenience or necessity which tolerates their existence. We think that there can be no doubt that the company was bound to furnish gas to the plaintiff upon his complying with such reasonable conditions or terms as they might rightfully impose." If a person who applies to a gas company to have his building or premises supplied with gas, is indebted to the company for gas previously supplied to him at the same building or premises, the company may refuse to supply him until the debt is paid. This is a reasonable regulation, and for the non-payment by a customer for gas of any amount furnished to him, the company may shut off his supply and remove its meter from his premises." Detroit Gas Co. v. Moreton, 111 Mich. 401. But whether a gas company can refuse to furnish gas to a consumer at certain premises because he has not paid a bill for gas consumed at other premises, is a question upon which the authorities are not altogether agreed. In Maryland, for instance, it has been held that where a gas company enters into two distinct contracts with A, to supply different houses with gas, each requiring its own meter, a failure by A to pay for gas furnished to one of the houses, or to comply with any terms in relation thereto, will furnish no excuse or ground for the company to withhold gas from the other house. Gas Light Co. v. Colliday, 25 Md. 1. In this case the court said: "The contracts for the two houses were separate and distinct and in no wise dependent. They were entered into at different times, each for its distinct property. Bills have been made out and rendered separately. Each house had its own meter. We are of the opinion that where several contracts are made between the same parties for different pieces of property, each requiring its own meter, as in this case, the failure to comply with any terms in relation to one furnished no excuse or ground to the company to withhold the gas from the other. As long as the terms in regard to the latter are complied with, the company continuing its manufacture is bound to continue the supply of gas to it." This case may be explained in that the contract specified that the gas should be turned off by the company from such premises for which the owner was delinquent at the time. In the case of Wood v. City of Auburn, 87 Me. 287, a water company proceeded to shut off the water supply of one of its customers, on the ground that an old overdue and disputed bill for six months previous was remaining unpaid, although it had continued to supply water for the succeeding six months and accepted payment for the subsequent installment. The court enjoined the water company from shutting off the water, and held that the acceptance of the subsequent installment of water rates was a waiver of their right to shut off the water for non-payment of the previous installment. The court uses these strong words: "The only trouble is over an old and disputed bill. The Acqueduct company could have insisted upon payment of this bill in advance but did not. It could have shut off the water during the time covered by the bill but did not. It preferred to let the bill in dispute stand. It accepted Mr. Wood's money for the next installment; after having resumed these relations with Mr. Wood, the company now insists that he be summarily deprived of an instant and constant necessity, in order to coerce him into a surrender of his position of defense against the old bill. The parties are not upon equal ground. The water company cannot do as it will with its water. It owes a duty to each consumer. The consumer once taken on to the system becomes dependent on that system for a prime necessity of business, comfort, health and even life. To suddenly deprive him of this water in order to force him to pay an old bill claimed to be unjust, puts him at an enormous disadvantage. He cannot wait for the water, he must surrender and swallow his choking sense of injustice. Such a power in a water company places the consumer at its mercy. It can always claim that some old bill is unpaid, the receipt of which may have been lost or the money embezzled by the collector. The water company at one time had the right to insist

upon the payment of the old bill before furnishing water. That right is now fully and effectually waived and cannot be resumed at the pleasure of the company." In the case of Lloyd v. Gas Light Co., 1 Mackey, 331, the plaintiff on moving into his place of business signed the following agreement: "I hereby agree to take gas from the Washington Gas Light Co., on the condition that the company reserves to itself the right to refuse to furnish or at any time to discontinue gas to any premises the owner or occupant of which shall be indebted to the company for gas or fittings used upon such premises or elsewhere." Held, that this contract related only to future differences and that defendant was liable to damages for cutting off plaintiff's supply of gas because of non payment of an old bill for gas furnished before the signing of this contract, and at another place. In this case Judge Wylie dissented, and said: "This case presents the question whether a man who moves about from one house to another and runs away without paying his gas bill can compel the gas company to furnish him with gas at every new removal, without being obliged to pay his old bill. I put my dissent to this decision of the court upon grounds entirely independent of the special contract entered into by the parties. I base my opinion on general principles. The business of a gas company is in some respects like a common carrier, but a common carrier is not required to carry a man's goods who refuses to pay up for past dues, and this company I think had a perfect right to say to this man, we will not furnish you with gas unless you pay up your arrears."

The only question of real difficulty in this whole subject arises in the principal case, but is not fully nor satisfactorily discussed, *i. e.*, to what extent a gas company has the right to shut off gas from the premises of the consumer when an honest and reasonable dispute arises over the payment of a former bill or a bill for gas furnished other premises. Suppose a partnership firm engaged in business makes objection to the payment of a bill for gas furnished at their business premises, has the gas company the right to coerce payment of that bill by cutting off the supply at the residences of the individual partners? The authorities are agreed on two ways of procedure which the consumer may take when confronted with a situation of this kind. If the gas has not yet been turned off he may bring an action in equity to have the dispute between himself and the company adjudicated, and enjoin the company from discontinuing the supply of gas furnished his premises until the dispute is legally determined. Sickles v. Manhattan Gas Co., 64 How. Pr. (N. Y.) 33; Wood v. City of Auburn, 87 Me. 287. Or else he may pay the amount of the bill claimed to be due, under protest, or refuse to pay, and in either case will be entitled to damages if his objection to the payment of the bill is sustained and the company was unwarranted in cutting off the supply. Lloyd v. Gas Light Co., 1 Mackey, 331; Gas Light Co. v. Colliday, 25 Md. 1; Shepard v. Milwaukee Gas Co., 15 Wis. 318; Morey v. Metropolitan Gas Co., 38 N. Y. Super. Ct. 185. In the case of Sickles v. Manhattan Gas Co., 64 How. Pr. (N. Y.) 33, it was held that a law allowing a gas company to stop the supply of gas in case of the non-payment of bills for the gas, did not make the gas company the sole judge of the question whether any, and if so what amount of remuneration, is due to it. When a dispute arises between the company and a consumer, the latter is entitled to have his rights investigated by a court and an injunction will be granted to prevent the cutting off of the supply of gas until the cause can be tried. In this case the plaintiff claimed that a bill for 1,000 feet of gas consumed was unjust, because he was out of the city during the whole of the time, and his house was shut up. He therefore brought suit to have the exact amount used ascertained, and that in the meantime the defendant be restrained from cutting off the gas from his premises. The court said: "It has long been settled that a court of equity will intervene by injunction to prevent irreparable injury. This seems to me to be a case in which if the plaintiff is right it cannot be justly claimed that he can be fully compensated by an action for damages. The use of gas in cities has become almost as great a necessity as the use of water, and the deprivation of one or the other would cause, I think, such damage as to call for the intervention of a court of equity."

The amount of damages to which the plaintiff is entitled for the failure on the part of the company to supply him with gas is such as will compensate him for his pecuniary loss, also for the inconvenience and annoyance expressed by him in his mercantile business arising out of defendant's refusal to furnish gas to him. Shepard v. Milwaukee Gas. Co., 15 Wis. 318. The measure of damages for violation by a natural gas company of its contract to supply a glass factory for a certain period with sufficient fuel to operate its plant, whereby the company was compelled to suspend its business, is, where the business was a new one in that vicinity, the expense necessarily, actually incurred in organizing the factory, the fair rental value of the idle factory, if it has any, and if it has none, the interest on the money invested therein, together with interest on any idle working capital, the use of which has been lost by the violation of such contract. Paola Gas Co. v. Paola Glass Co., 56 Kan. 614.

In conclusion, the following general rules, may be deducible from the authorities. A gas company is under obligations to serve without discrimination all citizens who comply with its regulations; that a gas company may make any regulation for its own convenience or that of the public which is reasonable and just; that a regulation to shut off the supply for non-payment of a bill for gas previously furnished, is reasonable and just; that where an honest dispute arises between the company and the consumer, the latter is entitled to have his rights investigated by the courts and to have an injunction preventing the company from cutting off the supply of gas pending the settlement of the dispute; that where the company refuses arbitrarily and without reason to supply a citizen with gas and the right of the citizen to demand the services of the company is clear, a writ of *mandamus* will issue against the latter compelling it to furnish the amount of gas requested; that where the right of the citizen or consumer is not clear, or where a dispute exists between them, a writ of *mandamus* will not be available, but that in such cases the consumer is thrown upon his action for damages against the company for its unlawful or unwarranted refusal.

St. Louis. A. H. ROBBINS.

BOOK REVIEWS.

THE LAW OF REAL PROPERTY.

In this treatise the authors have attempted to depart somewhat from the beaten track. In most works on the law of real property much space has been given to obsolete law. In this work the authors have given their attention chiefly to branches of the law which are practically useful and important, and

which relate to questions which are constantly before the courts for decision; useful rather than ornamental law; adapted to the needs of those who are now or shortly expect to be engaged in the active practice of the law. The sections devoted to mortgages, fixtures and landlord and tenant illustrate these features. Free use has been made of quotations from leading cases. The authors claim to have devoted three years to the preparation of their manuscript, and judging from the thoroughness of their work we are prepared to accept this statement as true. The chapter on freehold estates not an inheritance is especially interesting and instructive. Of equal interest also is the chapter on estates less than freehold, a large portion of which is devoted to the subject of leases. It will be difficult to find a treatise on real property containing more well condensed, practical and useful information than is furnished in the 500 pages before us. The work is well adapted to the use of law schools. The authors are John G. Hawley and Malcolm McGregor, authors of Hawley and McGregor on Criminal Law. The book is well bound in law sheep. Published by Collector Publishing Company, Detroit, Mich.

HUMORS OF THE LAW.

A German had been accepted as a juryman. He desired to be released on the ground, "I no understand good English." "That is no excuse," said the judge. "You will not hear any good English during this trial."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACTION — Parties.—A defendant cannot compel others than those who have sued him to become plaintiffs, or have judgment against them in such action.—FRISBIE v. MCFARLANE, Penn., 46 Atl. Rep. 358.

2. ACTION—Torts—Splitting Cause of Action.—Injuries to the person and injuries to the property of the person injured, both resulting from the same tortious acts, are separate items of damages, constituting but one cause of action.—KING v. CHICAGO, M. & ST. P. RY. CO., Minn., 82 N. W. Rep. 1113.

3. ALIENS — Naturalization — Rights of British Subjects.—Former citizens of the United States, who have by naturalization become British subjects, are, while domiciled in the United States, entitled by treaty to all the rights of native-born British subjects.—NEWCOMB v. NEWCOMB, Ky., 57 S. W. Rep. 2.

4. ALIENS—Presumptions—Naturalization.—Where a party is shown to be an alien, such alienage is presumed to continue until some evidence to the contrary is produced. But proof that such party voted in this country overcomes the presumption of alienage, and raises a presumption of naturalization, as the law will not presume that the party committed an unlawful act.—KADLEC v. PAVIC, N. Dak., 83 N. W. Rep. 5.

5. APPEAL—Constitutional Question First Raised by Assignment of Error.—A question as to the constitutionality of a State statute, first raised in the assignment of errors in the circuit court of appeals, with nothing to present it in the circuit court except a general exception to an instruction in favor of the plaintiff's right to recover under the statute, will not sustain a writ of error to the Circuit Court of the United States from the supreme court, under the act of congress of March 3, 1891, chap. 517, § 5.—CINCINNATI, HAMILTON, & DAYTON RAILROAD COMPANY v. BENJAMIN F. THIEBAUD, U. S. S. C., 20 Sup. Ct. Rep. 822.

6. ARBITRATION—Award.—Courts will not enforce an award made pursuant to the rules and usages of a church as interpreted by its officers, where the articles of submission do not show what was submitted, and fail to provide that the award shall be final.—RAWLINSON v. SHAW, Mich., 82 N. W. Rep. 1054.

7. ATTACHMENT — Pleading — Amendment.—Where plaintiff sued in attachment, declaring as on a debt due, and it appeared on the trial that only a part of the debt was due at the time of the commencement of the action, the fact that defendant failed to plead such fact in abatement or at the trial did not preclude a reversal for such error urged for the first time on appeal. — HART v. CHEMICAL NAT. BANK OF CHICAGO, Miss., 27 South. Rep. 292.

8. ATTACHMENT AND GARNISHMENT—Statutes—Property Out of State.—Our statutes regulating attachment and garnishment (sections 5522, Rev. St., and following), do not give to the court issuing such process jurisdiction over property of the defendant situate wholly beyond the borders of the State, nor power to require a garnishee having property of the defendant in his possession without the State to surrender the same into the custody of the courts; and an order on the garnishee requiring such act is without legal effect.—BUCKEYE PIPE-LINE CO. v. FEE, Ohio, 57 N. E. Rep. 446.

9. BANKRUPTCY—Application for Discharge—Grounds of Opposition.—It is no ground of opposition to the discharge of a bankrupt that the debts due to the objecting creditors were contracted in fraud, or that they were induced to sell goods to the bankrupt, and give him credit, by his false representations as to his financial condition at the time, and as to his business relations with a third person.—IN RE PEACOCK, U. S. D. C., E. D. (N. Car.), 101 Fed. Rep. 560.

10. BANKRUPTCY—Costs and Expenses—Fee of Creditor's Attorney.—Where one of the creditors of a bankrupt, by his attorney, objects to the allowance of a claim filed by another creditor, the trustee declining

to interfere, and upon a contest and trial secures its rejection, thereby saving a considerable sum for distribution among the creditors generally, the attorney for such contesting creditor may be allowed a fee for his professional services rendered, to be paid out of the estate.—IN RE LITTLE RIVER LUMBER CO., U. S. D. C., W. D. (Ark.), 101 Fed. Rep. 558.

11. BANKRUPTCY—Fraudulent Conveyances — Action to Set Aside.—Under Const. U. S. art. 1, § 8, cl. 4, providing that congress shall have power to pass uniform laws of bankruptcy, a trustee in bankruptcy, appointed under the bankruptcy law of 1898, cannot maintain an action in a State court to set aside a conveyance made by the bankrupt to defraud creditors and to avoid the provisions of the bankruptcy law, as the jurisdiction of the federal courts is exclusive as to all matters relating to the administration of the estate of the bankrupt.—LYON V. CLARK, Mich., 82 N. W. Rep. 1058.

12. BANKRUPTCY—Jurisdiction—Requiring Bankrupt to Surrender Property.—Two essential facts condition the lawful exercise of the power to require a bankrupt or other person to pay or deliver to the trustee money or property in his possession. They are that the money or property directed to be delivered to the trustee is a part of the bankrupt estate, and that the bankrupt or person ordered to deliver it has it in his possession or under his control at the time the order of delivery is made.—IN RE ROSSER, U. S. C. C. of App., Eighth Circuit, 101 Fed. Rep. 562.

13. BANKRUPTCY—Jurisdiction—Suits By and Against Trustees.—Under Bankr. Act 1898, § 2, cl. 7, as limited by section 23b, a district court, as a court of bankruptcy, has original jurisdiction of actions by trustees in bankruptcy to recover property alleged to belong to the estate of the bankrupt, against third persons claiming title thereto adversely to the bankrupt or in hostility to the trustee, provided the cause of action is one which did not originally exist in the bankrupt himself, and also of all actions brought in such court against a trustee in bankruptcy by adverse claimants. IN RE BAUDOUINE, U. S. C. C. of App., Second Circuit, 101 Fed. Rep. 574.

14. BANKRUPTCY — Opposition to Discharge — False Oath.—Where a bankrupt, on hearing on his application for discharge, produces to the court a written account, called a "Statement of Expenditures," which purports to show in detail the disposition made of a sum of money which he is charged with having secreted, and testifies to its truth, but such statement is in fact false and inaccurate, if the inaccuracies are the result of an intentional and fraudulent manipulation of figures, for the purpose of making a showing favorable to the bankrupt, and not the consequence of an honest mistake, he is guilty of making a "false oath and account in a proceeding in bankruptcy," within the meaning of Bank. Act 1898, § 29b, subd. 2, and his discharge must be refused.—IN RE DEWS, U. S. D. C., D. (R. I.), 101 Fed. Rep. 549.

15. BILLS AND NOTES — Action—Directing Verdict.—The mere possession of a negotiable promissory note, which is not payable to bearer and is unindorsed, by another than the payee, is not *prima facie* evidence of the ownership of such note. Accordingly it was error for the trial court to direct a verdict for the amount of the note in suit; there being no other evidence of title, and plaintiff's ownership being denied by the answer. —SHEPARD V. HANSON, N. Dak., 83 N. W. Rep. 20.

16. BILLS AND NOTES—Note—Principal and Surety—Release.—Where the maker, sureties, and payee to a note enter into a contemporaneous agreement for the payment of 10 per cent. of said note weekly, in consideration of which the payee agrees to permit the makers to order an equal amount of goods, the sureties cannot claim a release because new goods are shipped the makers without the payment of the 10 per cent.—ROUSS V. KRAUSS, N. Car., 36 S. E. Rep. 146.

17. BROKERS—Sale of Realty—Authority.—A real estate broker with whom lands are listed for sale by the owner has no authority to make contracts for the sale thereof which will bind the owners, in the absence of written authority signed by such owners authorizing him to do so.—BALLOU V. BERGVENDSEN, N. Dak., 83 N. W. Rep. 10.

18. BUILDING ASSOCIATIONS—Loans.—A corporation authorized F, who, as trustee, held title to land for its benefit, to borrow money for it from a building association. To do this, he had to subscribe for stock of the association. On the certificate therefor the association made him the loan; the certificate being assigned to the association, and deposited with it as collateral. At the same time the corporation, F, and others executed their bond to the association for the amount of the loan, and F and the corporation executed as additional security a mortgage on the land held by him as trustee. Held, that the mortgage was liable for the amount the stockholder in the association was bound to contribute to restore the capital impaired by losses, whether the corporation be considered as the holder of the stock, through F as agent, or whether F be considered the holder.—MEARES V. MONROE LAND & IMPROVEMENT CO., N. Car., 36 S. E. Rep. 150.

19. CARRIERS—Liability for Injury to Passenger on Leased Railroad.—The existence of a lease by a railroad company of its road for an annual rental will not relieve a company which is running a train over the road from liability for injury to a passenger caused by the negligence of its own agents or servants in charge of the train.—CHESAPEAKE & OHIO RAILWAY COMPANY V. HOWARD, U. S. S. C., 20 Sup. Ct. Rep. 880.

20. CARRIERS — Passengers — Negligence—Burden of Proof.—When a passenger, riding by invitation in the caboose of a mixed train, is injured by the falling of a bed frame fastened above him when the freight cars were backed against the caboose, the *onus* is upon the railroad company to show that the bed frame was properly secured.—STOODY V. DETROIT, G. R. & W. RY. CO., Mich., 83 N. W. Rep. 26.

21. CARRIER OF GOODS—Contract Limiting Common-Law Liability.—Const. § 196, providing that "no common carrier shall be permitted to contract for relief from its common-law liability," does not prohibit a carrier incorporated in Kentucky from contracting in another State for exemption from liability for loss by fire, where the goods shipped are in that State, and are not even to pass through Kentucky.—TECUMSEH MILLS V. LOUISVILLE & N. R. CO., Ky., 57 S. W. Rep. 9.

22. CHATTEL MORTGAGE — Mortgagee's Knowledge of Mortgagor's Fraud as to Creditors.—Proof that the agent of the mortgagees of chattels was a lawyer of long standing and considerable practice, and that a debt to himself which has been already partially paid was secured by the mortgage, and that he was the son-in-law of the head of the firm which gave the mortgage, and who had previously given deeds to members of his family, one of them being to the lawyer's wife, which deeds had been long withheld from record, and that the mortgagors were merchants, constantly buying and replenishing their stock, and standing in need of credit, is sufficient to go to the jury on the question of his connection with the scheme of the mortgagors to execute the mortgage for the purpose of defrauding their unsecured creditors.—BROWNING V. DEFORD, U. S. S. C., 20 Sup. Ct. Rep. 876.

23. CONSTITUTIONAL LAW—Regulation of Pawnbrokers.—In a prosecution for carrying on the business of pawnbroker without a license, a complaint in the language of the statute is sufficient. It being within the police power of the legislature to regulate the business of pawnbrokers, a statute requiring pawnbrokers in cities or towns of 10,000 inhabitants or more to pay a license is not unconstitutional because not applying to all citizens of the commonwealth, since such statute applies to all citizens similarly circumstanced.—COMMONWEALTH V. DANZIGER, Mass., 57 N. E. Rep. 461.

24. CONVERSION—Crops—Pleading.—A complaint, by one holding a landlord's lien on crops, alleging that

defendant converted the crop to his own use during the existence of the lien, without an averment showing that such lien was thereby lost or impaired, states no cause of action.—SCARBROUGH v. ROWAN, Ala., 27 South. Rep. 919.

25. CORPORATIONS — Foreign Corporations—Appointment of Receiver.—A court of equity in the jurisdiction where a foreign corporation has a *situs* for the transaction of its business, and where its property is situated, is without jurisdiction, in the absence of a statute conferring it, to appoint a receiver for such corporation, with a view to winding up its affairs and distributing its assets, at suit of a resident minority stockholder, who complains alone of the internal management of its affairs, whereby the value of his stock has been diminished and is threatened with further prospective injury, where the corporation is solvent, and the directors and majority stockholders whose actions are complained of are non-residents.—SIDWAY v. MISSOURI LAND & LIVE STOCK CO., U. S. C. C., S. D. (Mo.), 101 Fed. Rep. 461.

26. CORPORATIONS—Leases—Ultra Vires.—A corporation which has leased to another its property, for a consideration of which it has received the benefit, cannot, in an action to restrain it from taking possession of the property for an alleged breach of the covenants of the lease, set up as a defense that the execution of the lease was *ultra vires* as to the parties to it.—PITTSBURGH, ETC. R. CO. v. ALTOONA, ETC. R. CO., Penn., 46 Atl. Rep. 431.

27. CORPORATIONS—Power of Officers.—The authority of the president of the corporation to execute a mortgage to which the corporate seal is not attached will not be presumed, but must be proved *aliunde*.—AMERICAN SAV. & LOAN ASSN. v. SMITH, Ala., 27 South. Rep. 919.

28. CORPORATION—Stocks—Bona Fide Purchaser.—Where, on the face of certificates of stock, absolute ownership appears in him who is in possession thereof, and there is no evidence outside showing actual or constructive notice that the ownership is in another, the person taking such certificates for value gets title, good against the actual owner, who put it in the power of the one in possession to deal therewith as his own.—WESTINGHOUSE v. GERMAN NAT. BANK OF PITTSBURG, Penn., 46 Atl. Rep. 380.

29. CORPORATION—Stock — Pledge.—A surety on a promissory note became such on the agreement of the principal to transfer to him as collateral security against loss a certificate of stock he then held within a short time. Held, that the surety thereby acquired an equity in the stock which he could enforce for his indemnity against all persons having notice.—DEUBER WATCH-CASE MFG. CO. v. DAUGHERTY, Ohio, 57 N. E. Rep. 455.

30. COVENANTS—Waranty of Title.—Where a grantor, owning an estate *per autre vie*, conveyed the lands, warranting and defending the premises against all persons lawfully claiming the same, the grantee in possession cannot maintain an action for a breach of said covenant of title, since the outstanding title in remainder does not constitute a constructive eviction.—OLIVER v. BUSH, Ala., 27 South. Rep. 928.

31. CREDITORS' BILL — Fraudulent Conveyances.—A creditors' bill to set aside a transfer of shares of stock, and subject same to the payment of a judgment, may be maintained by a subsequent creditor, where the transfer is a mere pretense to enable the holder to dispossess himself of the apparent ownership, while he retains the beneficial interest therein.—HIGHLEY v. AMERICAN EXCH. NAT. BANK, Ill., 57 N. E. Rep. 436.

32. CRIMINAL EVIDENCE—Dying Declarations.—Dying declarations as to the cause of death, admissible in evidence against the accused at common law, are not excluded under the right given defendant, in the constitution, to be confronted with the witnesses against him.—STATE v. JESWELL, R. I., 46 Atl. Rep. 405.

33. CRIMINAL LAW—Embezzlement.—A landlord who takes possession of the tenant's crop, of which he is entitled to one-half, and sells it, and refuses to account to the tenant for his share of the proceeds, is not guilty of embezzlement, under Code, § 1014, declaring "any officer, agent, clerk, employee or servant of any corporation, person or co-partnership, who shall embezzle or fraudulently convert to his own use" any money, goods, or other chattels belonging to any other person, shall be guilty of felony.—STATE v. KEITH, N. Car., 36 S. E. Rep. 169.

34. CRIMINAL LAW—Homicide—Verdict.—Under Code, § 5306, providing that the defendant may be "found guilty of any offense which is necessarily included in that with which he is charged," on a trial for murder, charged to have been committed by striking the deceased with a joint of iron pipe, the defendant may be convicted of assault with intent to commit murder.—THOMAS v. STATE, Ala., 27 South. Rep. 920.

35. CRIMINAL PRACTICE — Indictment — Separate Counts.—The omission of defendant's name in the second count of an indictment containing two separate counts cannot be supplied by reference to the first.—POWELL v. STATE, Tex., 57 S. W. Rep. 95.

36. CRIMINAL PRACTICE—Robbery—Variance.—Where an indictment charges that defendant committed robbery by means of an assault, and by violence, and by putting in fear of life and bodily injury, evidence that defendant used a firearm does not constitute a variance of which he can complain.—CARROLL v. STATE, Tex., 57 S. W. Rep. 99.

37. DEED — Appeal and Error.—A deed conveying all of the grantor's unsold lands in a certain league and county, named, may be aided by proof of what conveyances of land in such league from said grantor appear of record, for the purpose of identifying the land conveyed, although the deed does not refer to the records or abstracts for identification of the lands previously conveyed.—SMITH v. CLAY, Tex., 57 S. W. Rep. 74.

38. DESCENT AND DISTRIBUTION — Liability for Decedent's Debts.—When the lands of an intestate descend to his children, there being no personal estate for distribution, the interest of each child in the lands is subject to his indebtedness to the intestate.—KEEVER v. HUNTER, Ohio, 57 N. E. Rep. 454.

39. DEVISE FOR CHARITABLE CORPORATION—Validity.—Testatrix devised her estate, both real and personal, to a definite trustee legally incorporated, and directed as to the remainder, after the payment of a certain legacy and the termination of certain life estates in trust, that the trustee should hold the same "in trust for the use and benefit of the Old Women's Home at Nashville, Tennessee," a charitable institution, also legally incorporated, "and dispose of and apply said estate, or the proceeds to be realized from its sale, as the directors of said Old Women's Home may direct or determine may be best and most advantageous for said institution." Held that, whether treated as realty or personalty, the devise to the home was not void for uncertainty.—CHEATHAM v. NASHVILLE TRUST CO., Tenn., 57 S. W. Rep. 202.

40. ELECTIONS — Mandamus — Recount.—*Mandamus* will not lie to compel a town board of inspectors to reassemble and recount ballots cast for supervisors at a town meeting held February 21, 1899, in the manner prescribed by the general election law, since the election law is not applicable to town meetings unless specially made so by the town law, and the counting of such ballots was governed by Town Law, § 37, requiring public canvass of votes by count and comparison with the poll list, which, on being read, should be notice of the election, and under which no preservation of ballots was necessary.—IN RE LARKIN, N. Y., 57 N. E. Rep. 404.

41. EMINENT DOMAIN—Exercise of Right—Injunction.—Where a railway company is proceeding regularly under its charter to possess itself of its roadbed, without proof that its action is being taken for the doing of some illegal act, equity cannot interfere to restrain it from exercising its statutory rights.—GAW v. BRISTOL & B. R. CO., Penn., 46 Atl. Rep. 372.

42. EMINENT DOMAIN—Measure of Compensation for Property Taken.—In estimating the compensation to which a landowner is entitled on the taking of his property for a public use, the adaptability of the property in its present state and surroundings for other and more valuable purposes than those to which it has been put is a proper element to be considered in determining its market value; but its possible value under circumstances and conditions which do not exist, but which the owner may intend to create, cannot be considered.—FIVE TRACTS OF LAND IN CUMBERLAND TP., ADAMS CO., PA. v. UNITED STATES, U. S. C. C. of App., Third Circuit, 101 Fed. Rep. 661.

43. EQUITY—Breach of Contract.—A bill alleging the existence of a contract by which plaintiff was to construct a railroad for defendant, and its breach by defendant in refusing to allow plaintiff to proceed in its execution, states no ground for relief in equity, but the remedy is by an action at law for damages; and until the damages have been so ascertained, and the legal remedy exhausted, equity cannot ascertain jurisdiction to aid in enforcing their payment, although the defendant is alleged to be insolvent.—STRANG v. RICHMOND, P. & C. R. CO., U. S. C. C. of App., Fourth Circuit, 101 Fed. Rep. 511.

44. ESTOPPEL—Consideration of Contract—Effect of Recitals.—Where by a contract one party agreed to execute his notes to the other for a lump sum—the consideration being the satisfaction of a judgment against the maker for a much larger amount, and the rendition by the payee of services as a lawyer in certain pending litigation—a subsequent agreement apportioning such notes between the two considerations does not estop the payee, in a suit by the maker for cancellation of the notes apportioned as a retainer on the ground, among others, that the amount was excessive and exorbitant, from showing that such notes were in fact based on both considerations.—WHEELER v. MCNEIL, U. S. C. C. of App., Eighth Circuit, 101 Fed. Rep. 685.

45. EVIDENCE — Parol Evidence — Consideration of Deed.—An additional consideration to that expressed in a deed may be shown by parol evidence, provided such consideration be consistent with the operation of the deed.—JENSEN v. CROSBY, Minn., 83 N. W. Rep. 48.

46. FEDERAL COURT—Jurisdiction—Judgment of State Court.—A federal court may take jurisdiction of a suit to set aside a judgment of a State court in the same State, when it is attacked for fraud and want of jurisdiction because it was rendered on service by publication, the order for which was obtained by a false affidavit.—HOWARD v. CORDOVA, U. S S. C., 20 Sup. Ct. Rep. 817.

47. FEDERAL AND STATE COURTS—Arrest for Executing Process.—A United States marshal cannot be subjected to arrest and imprisonment by the authorities of a State for acts done pursuant to the commands of a writ issued to him by a court of the United States, but is protected by his process, and if so arrested, will be discharged by a federal court on *habeas corpus*.—ANDERSON v. ELLIOTT, U. S. C. C. of App., Fourth Circuit, 101 Fed. Rep. 609.

48. FORGERY—Variance.—Where the indictment in a prosecution for forgery describes a note without revenue stamps, the reception in evidence of a note with stamps does not constitute a variance, since the stamps are no part of the note, and it is not necessary to describe them.—GILES v. STATE, Tex., 57 S. W. Rep. 99.

49. FRAUDULENT CONVEYANCE—Suit to Set Aside.—A judgment creditor is not entitled to set aside a conveyance by an insolvent judgment debtor, and to subject the land to the payment of the judgment, where it is not shown that other parties to the judgment are also insolvent.—RIDDICK v. PARR, Iowa, 82 N. W. Rep. 1002.

50. HOMESTEAD — Selection.—Where the head of a family owns a section of land, and his dwelling house stands upon one governmental quarter section thereof, he may select his homestead from any portion of such section that may best suit his convenience and interests, with the limitations that such selection must include the dwelling house and appurtenances, and must not exceed 160 acres in extent or $5,000 in value.—FOOGMAN v. PATTERSON, N. Dak., 83 N. W. Rep. 15.

51. HUSBAND AND WIFE — Checks—Forged Indorsement.—A, falsely representing himself as B, who was the owner of certain land, obtained a loan on a mortgage executed by him in B's name on the land; the lender giving him a check therefor drawn to the order of B. He indorsed it, in the name of B to defendant; and the latter indorsed it, and obtained the money thereof of the bank on which it was drawn. Held, that, it having been given to the person intended, the drawer had no claim against the bank, and therefore the bank had no claim against defendant.—LAND-TITLE & TRUST CO. v. NORTHWESTERN BANK, Penn., 46 Atl. Rep. 420.

52. HUSBAND AND WIFE — Wife's Services — Instructions.—A single and a married brother owned adjoining farms, on one of which they lived in the same house, and farmed both places, under a partnership agreement that the unmarried brother should furnish half of the family provisions and fuel, and that he should receive his board, washing, ironing and mending in the family. The married brother's wife lived in the family, and had no other occupation than a housewife. After her husband's death she brought an action against the surviving brother to recover for the services performed in furnishing such board, washing, ironing and mending. Held, that the services of the wife belonged to the husband, and she could not recover.—MCCLINTIC v. MCCLINTIC, Iowa, 82 N. W. Rep. 1017.

53. INTOXICATING LIQUORS—Sales by Non-Residen Vendor.—Where the traveling salesman of a dealer in intoxicating liquors in another State, whose authority is limited to taking orders subject to the approval of his employer, receives an oral order for whisky to be shipped from such other State, and paid for by the vendee by giving the price to the salesman, or by remittance to the vendor, the contract, not being completed until accepted by the vendor, is not a contract made in this State, and in contravention of the laws of this State against the traffic in intoxicating liquors, although the purchaser was not aware of the limitation on the salesman's authority, if no attempt is made to mislead him in this regard.—SACHS v. GARNER, Iowa, 82 N. W. Rep. 1007.

54. JUDGMENT AGAINST HUSBAND—Property of Wife—Tax Title.—When property owned by a husband was sold to the State for taxes, and the wife purchased the same from the assignee of the State's title acquired under a tax sale, she was not affected by a suit pending to subject the land to the husband's debt, at the time of the sale, since the title acquired under the tax sale was in opposition to the wife's title, and was not affected by the doctrine of *lis pendens*.—BOYKIN v. JONES, Ark., 57 S. W. Rep. 17.

55. JUDICIAL SALES—Agreement of Purchaser.—The fact that a debtor whose land was being sold under decree induced other persons not to bid against C, who had agreed to buy the land and permit him to redeem, does not preclude him from enforcing the agreement against C, as the fraud upon creditors, if any, could only be considered by way of objection to the confirmation of the report of sale.—CRANE v. ARNOLD, Ky., 57 S. W. Rep. 11.

56. LANDLORD AND TENANT—Lien—Individual Partners.—Under Code, § 2992, providing that a landlord shall have a lien on all crops grown on the leased premises, and any other personal property of the tenant used and kept thereon, individual property of one member of a firm, used and kept on the leased premises, is not subject to the landlord's lien for rent due from the firm.—WARD v. WALKER, Iowa, 82 N. W. Rep. 1023.

57. LIMITATIONS—Application by Court of Equity.—A court of equity, in a suit to charge the defendant, as

trustee, with a sum which might have been recovered in an action at law, will apply the statute of limitations which would have governed the action at law.—NASH v. INGALL, U. S. C. C. of App., Sixth Circuit, 101 Fed. Rep. 645.

58. LIMITATIONS—Commencement of Action—Amendments.—Amendments to a petition against a railroad receiver to recover damages for the death of an employee do not constitute new suits for the purpose of limitations, where the substantive cause of action in both original and amended petitions was the negligence of the receiver.—CINCINNATI, N. O. & T. P. RY. CO. v. GRAY, U. S. C. C. of App., Sixth Circuit, 101 Fed. Rep. 623.

59. MASTER AND SERVANT—Assumption of Risk—Vice-Principal.—Where a servant is injured, being caught by a bolt which remains in a timber in the work of tearing away a portion of a bridge, he assumes the danger of the negligence of his fellow-servants, as well as the apparent and probable risks of the service in which he is engaged —O'NEIL v. GREAT NORTHEN RY. Co., Minn., 82 N. W. Rep. 1096.

60. MASTER AND SERVANT—Injury to Volunteer.—A person who voluntarily assumes to act as a baggage man on a railroad train cannot recover for injuries received by defective appliance.—WAGEN v. MINNEAPOLIS & ST. L. RY. CO., Minn., 82 N. W. Rep. 1108.

61. MORTGAGE—Assignment—Delivery—Notice—One to whom a mortgage is assigned by parol, and is delivered, is entitled thereto, as against one whom the assignor afterwards assigns it in writing, he being put on inquiry by non-delivery of the mortgage.—APPEAL OF KITHIN, Penn., 46 Atl. Rep. 418.

62. MORTGAGES—Decrees of Foreclosure—Confirmation of Sale.—Mere inadequacy of price is insufficient ground for refusing a confirmation of a master's report of sale under a decree foreclosing a trust deed, since the grantor, by exercising his right of redemption, can have the same benefit as if the property had sold for its full value.—SPRINGER v. LAW, Ill., 57 N. E. Rep. 435.

63. MORTGAGES—Power of Sale—Guardian and Ward.—A guardian cannot exercise the power of sale contained in a mortgage executed by his ward prior to the guardianship, and purchase the mortgaged property at such sale.—HORTON v. MAINE, R. I., 46 Atl. Rep. 402.

64. MORTGAGES—Release—Statutory Requirements.—The Missouri statute (Laws 1897, p. 3), which provides that the recorder of deeds shall require the releasor of a mortgage to present for cancellation the notes secured, or make affidavit of their loss, if applicable in any case to a mortgage securing railroad bonds, cannot be given a retrospective effect, so as to render invalid the release of such a mortgage previously executed, where such release was made in accordance with the express provisions of the mortgage itself.—LYMAN v. KANSAS CITY & A. R. CO., U. S. C. C., W. D. (Mo.), 101 Fed. Rep. 636.

65. MUNICIPAL CORPORATIONS—Control of Public Parks—Dedication.—Where the owners of land in laying out a town site dedicated a part thereof for a public park, and the dedication was accepted by the city, it has no power to authorize its use as a site for a county court house, though such building would only occupy a part of the park.—MCINTYER v. BOARD OF COMRS. OF EL PASO CO., Colo., 61 Pac. Rep. 237.

66. MUNICIPAL CORPORATION—Negligence — Master and Servant.—A city hired from an improvement company the use of a steam roller and engineer. The city had full control over the movements of the steam roller, and directed its engineer where to operate it. The company paid the salary of the engineer, and had the power to discharge him. The roller being directed to operate where the ground was too soft to hold it up, sank in the mud, and the engineer, in a proper exercise of his duties, put on full steam, and extricated the roller from the mud. The steam then escaped with a loud noise, and frightened the horse of a traveler, who was permitted by the city's superintendent to approach without warning, injuring him. Held, that the city was liable therefor, and not the company.—STEWART v. CALIFORNIA IMP. CO., Cal., 61 Pac. Rep. 280.

67. MUNICIPAL CORPORATIONS—Street Excavations.—Where a lot owner excavated into the abutting sidewalk with knowledge of town authorities, the town, not having participated in the excavation, which was not made under its direction or for its benefit, was not liable, to a pedestrian injured thereby, as a joint tortfeasor, but only for negligently permitting such dangerous place to remain unguarded.—BROWN v. TOWN OF LOUISBURG, N. Car., 36 S. E. Rep. 166.

68. MUNICIPAL CORPORATIONS — Unauthorized Acts—Damages.—A city is not liable for damages resulting from its negligent and defective construction of a sluice for drainage, which it undertook without any authority, and not in the execution of any power conferred on it, since, to create such liability, the injurious act must have been within the scope of its corporate powers as prescribed by its charter.—BETHAM v. CITY OF PHILADELPHIA, Penn., 46 Atl. Rep. 448.

69. PLEADING—Trustee — Capacity to Sue.—Under Rev. St. 1889, §§ 1990, 1991, authorizing the trustee of an express trust to sue in his own name, and defining such trustee to include a person with whom or in whose name a contract is made for the benefit of another, where plaintiff made a contract on behalf of himself and other subscribers of defendant company, by which defendant undertook to run a certain number of trains per day from a certain station to a city, in consideration of $3,000 paid by such subscribers, plaintiff was entitled to sue in his own name to recover for a breach of the contract.—SAWYER v. WABASH RY. CO., Mo., 57 S. W. Rep. 108.

70. PRINCIPAL AND AGENT—Unlawful Sale—Proceeds.—While a contract to pay for whisky unlawfully sold will not be enforced, yet the seller may recover the proceeds of such sale, collected by the agent who made it.—HERTZLER v. GEIGLEY, Penn., 46 Atl. Rep. 366.

71. PUBLIC LANDS—Conflict Between Entry and Railroad Grant.—The right of one who has actually occupied public lands, with an intent to make a homestead or pre-emption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent, if he makes his entry as soon as an office is opened where he can do so.—TARPEY v. MADSEN, U. S. S. C., 20 Sup. Ct. Rep. 849.

72. RAILROAD COMPANY—Erection of Viaduct.—At common law the duty rests upon a railway corporation, when it occupies a public thoroughfare with its tracks, to restore the same, by some reasonably safe and convenient means, to its former condition of usefulness. And the duty is a continuing one, and the way must be kept in repair by the corporation whose act has made the duty necessary.—STATE v. MINNESOTA TRANSFER RY. CO., Minn., 83 N. W. Rep. 82.

73. RAILROAD COMPANY—Killing of Trespasser in Collision.—A railroad company owes no duty of care to a trespasser who, contrary to its rules, which are known to him, is riding on a construction train without the knowledge of the company's employees; and the gross negligence of such employees, which results in a collision in which the trespasser is killed, does not constitute actionable negligence as to him which gives a right of recovery for his death.—SINGLETON v. FELTON, U. S. C. C. of App., Sixth Circuit, 101 Fed. Rep. 526.

74. RAILROAD COMPANY—Regulation of Speed of Trains by City.—A regulation by a city of the speed of railroad trains within the city limits is not, as to interstate trains, an unconstitutional regulation of interstate commerce,—at least until congress shall take action in the matter.—ERB v. MORASCH, U. S. S. C., 20 Sup. Ct. Rep. 819.

75. RAILROAD COMPANY—Reorganization in Fraud of Creditors.—The transfer of the property of a railroad company, through foreclosure proceedings, to a reorganized company, in accordance with an agreement

between the principal stockholders and bondholders (who were for the most part the same persons and also the officers of the company), by which the new company was to issue its bonds to the old bondholders and its stock to the stockholders of the old company, cannot be made effective to relieve such property from the claims of general creditors of the old company, whose rights therein are superior to those of its stockholders, and such transfer will be set aside in equity, so far as necessary to protect the equitable rights of such creditors.—ST. LOUIS TRUST CO. v. DES MOINES, ETC. RY. CO., U. S. C. C., S. D. (Iowa), 101 Fed. Rep. 682.

76. REAL ESTATE AGENT — Right to Commissions.—A real estate agent employed to find a purchaser for the property is not entitled to commissions, though presenting one willing to pay the price; the person presented not being the real customer, who had instructed the agent to buy the property if he could get it at a fair price, and the agent having refused to tell the landowner who the real customer was, for fear she would understand his need of the property (he being the owner of the next lot), and would raise the price. —WILKINSON v. MCCULLOUGH, Penn., 46 Atl. Rep. 357.

77. REMOVAL OF CAUSES—Prejudice or Local Influence.—An application for the removal of a will contest to a circuit court of the United States for "prejudice or local influence," if authorized by the act of Congress of March 3, 1887, as corrected by the act of August 13, 1888, providing for the removal of causes "at any time before the trial thereof," comes too late when first made after a mistrial of the cause in a State pro bate court.—MCDONNELL v. JORDAN, U. S. S. C., 20 Sup. Ct. Rep. 886.

78. RES JUDICATA.—In a former action, brought by plaintiff on a contract to recover the stipulated amount for services rendered, defendant secured a judgment upon the ground that the contract had not been completed. In a second action plaintiff sued to recover the reasonable value of the same services. Held, that the judgment in the former action was not a bar to the latter.—ROSSMAN v. TILLENY, Minn., 83 N. W. Rep. 42.

79. RES JUDICATA—Pleading Former Judgment as Bar.—An action by a bondholder of a city against the city treasurer in his official capacity for a *mandamus* to compel payment of interest coupons is virtually an action against the city, and a judgment therein adjudging the coupons void may be pleaded in bar of a subsequent action brought by the plaintiff against the city by name to recover judgment on the same coupons.—RANSOM v. CITY OF PIERRE, U. S. C. C. of App., Eighth Circuit, 101 Fed. Rep. 665.

80. SALES—Conditional Sales—Validity.—Under Code 1873, § 1922, declaring that no conditional sale shall be valid against a creditor of the buyer in actual possession thereunder, without notice, unless in writing, executed by the seller, and acknowledged and recorded the same as a chattel mortgage, a bill of sale wherein title to the goods was retained by the seller till full payment, executed by the seller, and acknowledged and recorded, was sufficient to protect the seller's right to such goods against a subsequent creditor of the buyer, though such instrument was not executed by the buyer.—NATIONAL CASH-REGISTER CO. v. SCHWAB, Iowa, 82 N. W. Rep. 1012.

81. SALES—Delivery—Demand.—Where the agent of a nursery sold an order of trees to defendant, to be paid for on delivery, an instruction that tender of the stock was insufficient if coupled with a demand for the purchase price, because the agent had no right to make such a demand, was erroneous where, by the terms of the contract, the plaintiff was entitled to his pay on delivery.—RICE v. APPEL, Iowa, 82 N. W. Rep. 1001.

82. SALES—Fraud—Rescission.—A seller of goods purchased by the buyer under false and fraudulent representations as to his solvency cannot maintain an action to recover possession of the goods sold, or in the alternative the price thereof, since he must elect to either affirm the sale and sue for the price, or rescind the sale and sue for possession of the goods.—WEAR & BOOGHER DRY-GOODS CO. v. CREWS, Tex., 57 S. W. Rep. 75.

83. TAXATION—Assessment—Payment of Portion.—Where a taxpayer paid a part of a tax, which was thereafter returned to him by the collector on the taxpayer's inability to pay the balance before the expiration of the time when the tax must either have been paid or the land returned for delinquent taxes, such payment did not affect the State's lien on the land for the entire tax, nor invalidate a sale of the land for the same.—SAYERS v. O'CONNOR, Mich., 82 N. W. Rep. 1044.

84. TAXATION—Inheritance Tax Law—Exemption of United States Bonds.—A legacy of United States bonds is not exempted from the inheritance tax laws of a State by the provisions of the act of Congress of July 14, 1870, and the declaration on the face of the bonds issued thereunder, exempting them from taxation in any form by or under State authority, since the inheritance tax is not imposed on the bonds, but on the privilege of acquiring property by will or inheritance, which is a right and privilege created and regulated by the State.—PLUMMER v. COLER, U. S. S. C., 20 Sup. Ct. Rep. 829.

85. TRADE-MARK—Geographical Name.—The use of the name "Pocahontas Coal" by the selling agents for the owners of coal mined at or near a town called Pocahontas will not create an exclusive right in such agents to the use of the name for all the coal from that field, or deprive the mine owners of the right to use the same name.—CASTNER v. COFFMAN, U. S. S. C., 20 Sup. Ct. Rep. 842.

86. TRESPASS—Punitive Damages.—The mere unauthorized use by the owner of coal under land of plaintiff of his tunnel to transport coal from adjoining lands does not entitle plaintiff to punitive damages, or anything but nominal damages, and such further damages, if any, as will compensate him for any injuries resulting from the wrong.—SPRINGER v. J. H. SOMERS FUEL CO., Penn., 46 Atl. Rep. 370.

87. TRUST—How Declared—In Personal Property.—A trust in personal property may be declared, admitted, or created by parol declarations, and may be proved by parol evidence, and as to such trusts the statute of frauds does not apply; but a trust relating to real property must be declared and proved by some writing executed by the parties creating the trust.—SKEEN v. MARRIOTT, Utah, 61 Pac. Rep. 296.

88. TRUST—Proof—Sufficiency.—Where defendant executed a warranty deed to land to his mother for a valuable consideration, which she devised to her daughter, and which defendant claimed she had orally agreed to hold in trust for him, to be reconveyed on demand, loose declarations and statements said to have been made by the mother, "that George has a drawn-up contract with me that will bring him out all right, if he took care of it," and the testimony of a feeble-minded brother that he heard his mother and defendant "talking about contracts or making the land over," were insufficient to establish the trust.—MULOCK v. MULOCK, Mo., 57 S. W. Rep. 122.

89. TRUST—Spendthrift Trust.—A spendthrift trust is created as well in the case of the son as of the wife, where testator directs his executors to hold property in trust to pay the whole net income thereof quarterly to his wife, "into her own hands, for her separate use and maintenance," for life, "and not to be liable to anticipation, and her receipt alone to be the sole discharge to my said trustees," and, on her death, then to pay said net income quarterly to his son, "for his use and support," for life, "and not to be liable to anticipation, and his receipt alone to be the sole discharge to my said trustees."—WINTHROP CO. v. CLINTON, Penn., 46 Atl. Rep. 485.

90. TRUSTEE—Purchase of Trust Property—Laches.—A *cestui que trust*, who delays for 21 years to attack the title of the trustee acquired at execution sale under judgment of the trustee against the *cestui que trust*, is barred by laches.—CHURCH v. WINTON, Penn., 46 Atl. Rep. 863.

91. UNSAFE APPLIANCES—Negligence of Independent Contractor.—A master is not relieved from the positive personal duty which he is under to the servant by letting work to a contractor, and he cannot avoid liability for an injury to the servant due to the dangerous condition of appliances which he is required to use, on the ground that such dangerous condition was caused by the negligent acts of an independent contractor, whom the master had employed to make certain repairs about the premises.—TOLEDO BREW. & MALT. CO. v. BOSCH, U. S. C. C. of App., Sixth Circuit, 101 Fed. Rep. 330.

92. VENDOR AND PURCHASER—Conditions—Waiver.—Where a vendor agrees in writing to sell lands, and, on the vendees' being unable to comply with the contract, a written modification is made, whereby the vendees are to pay less, and the vendor is to convey subject to a mortgage, and then develops that there are two outstanding mortgages, and on being presented with the deed and discharges of the two mortgages the vendees request that the mortgages be extended, and afterwards request further time for themselves, the request for the extension of the mortgages is a waiver of the vendees' excuse for non-performance that there were two mortgages instead of one, and such excuse cannot be urged as a defense to the vendor's action for a forfeit payable on the vendees' default.—HURLBURT v. FITZPATRICK, Mass., 57 N. E. Rep. 464.

93. VENDOR AND PURCHASER — Specific Performance. —Where the vendor in a contract to convey land, of which time was made of the essence, grants such indulgence to the vendee, in permitting the time of payment to go by without declaring an immediate forfeiture, as might reasonably lead the latter to believe that he did not intend to insist on an immediate performance of the contract according to its terms, it works a suspension of the vendor's right to declare a forfeiture without notice.—EATON v. SCHNEIDER, Ill., 57 N. E. Rep. 421.

94. WAREHOUSEMEN—Damages — Several Action.—Under a contract, signed by a fruit company and a number of fruit growers, providing that such growers might deliver prunes to the company to be weighed, separately dried, and, after being graded into several sizes, weighed again to the respective owners, after which it might be mingled with other fruit in the bins used for the purpose, and that a receipt should be given to the owner calling for so many pounds in bulk, the contract, as between the fruit growers, was not joint, but several, and one of such growers was entitled to sue the company for damages to him under the contract.—ARNOLD v. PRODUCERS' FRUIT CO., Cal., 61 Pac. Rep. 283.

95. WAR REVENUE ACT—Tax on Legacy of Inheritance—Exemption of United States Bonds.—United States bonds included in a legacy or distributive share of a decedent's estate are not exempted from the tax on the transmission of such property, imposed by the war revenue act of 1898, §§ 29, 30, by reason of the declaration in the federal statutes and on the face of the bonds to the effect that they are exempt from taxation, since the tax is not upon the bonds, but on the right of transfer by will or under the interstate law.—MURDOCK v. WARD, U. S. S. C., 20 Sup. Ct. Rep. 775.

96. WATERS—Navigable Waters—Obstruction of.—A pass or crevasse caused by the overflow of the Mississippi river, making a channel to the Gulf of Mexico, through which a few fishermen have occasionally gone with small vessels carrying oysters for planting, and through which one or two cargoes of willows and timber may have passed, but which has not been used for any purpose of interstate commerce, and the gulf end of which has become closed, does not constitute a navigable water of the United States in such a sense that a dam erected therein for the purpose and with the effect of reclaiming overflowed lands and rendering them fit for cultivation will constitute an obstruction in navigable waters, within the prohibition of the act of Congress of September 19, 1890, against such obstructions without authority of the secretary of war.—LEOVY v. UNITED STATES, U. S. S. C., 20 Sup. Ct. Rep. 797.

97. WATERS AND WATER COURSES—Water Priorities. —Gen. St. 1893, §§ 1762, 1766, providing a mode of adjudicating questions concerning the priority of rights to water appropriation for irrigation purposes, have no application to cases where the point of diversion is within the State, but the lands to be irrigated lie without its territorial limits, and hence, in a proceeding under such statutes, water will not be decreed to irrigate New Mexico lands.—LAMSON v. VAILES, Colo., 61 Pac. Rep. 231.

98. WILLS—Absolute Devise—Life Estate.—Where a will recited testator's advancements to his children, and that he desired them all to be made equal, and, after they each received an amount making them equal with a son to whom a larger advancement had been made, anything remaining should be equally divided, and directed that a daughter's share should be vested in her to her separate use and control, and to be divided, at her death, among her children, the daughter acquired an absolute estate in such devise.—COLVILLE v. WOMACK, Tenn., 57 S. W. Rep. 196.

99. WILLS—Capacity to Execute — Evidence. — The probate of a will will not be set aside for incapacity of the testator, an aged man, to make it, on contestant's evidence that testator's mind was altogether off, because his talk was from one thing to another, and he did not seem to have the mind he ought to have, and would answer both yes and no when asked to do anything, where proponent's testimony shows that testator, when he executed the will, was of sound mind, and understood his business transactions.—APPEAL OF VOGLESONG, Penn., 46 Atl. Rep. 424.

100. WILLS—Conversion of Real Property.—The equitable conversion of real property into personalty by will is a matter within the exclusive province of the courts of the State in which the land lies to determine, although the will was made and has been probated at the domicil of the testator in another State, where it is construed to work such conversion of the real property wherever situated, and it is immaterial that the executor has not assumed to make any conveyance of the property.—CLARKE v. CLARKE, U. S. S. C., 20 Sup. Ct. Rep. 873.

101. WILLS—Devise—Conditions Subsequent.—Where a testator devised lands to his son, providing he should care for and support his mother as long as she should live, and the mother, by reason of ample means, did not need the son's support, and supported and cared for both herself and the son, the condition of the devise was only a personal condition subsequent, which the wife waived; and hence the fee of the land vested in the son on testator's death, and at the death of the son passed to his heirs.—ALEXANDER v. ALEXANDER, Mo., 57 S. W. Rep. 110.

102. WILLS—Devise—Vested Estate.—When testator devised a child's part of his real estate to his wife for life, the share of any child dying without living issue to go to the surviving children or their representatives, and the share devised to his wife for life to be equally divided on her death among the children and the issue of deceased children, the children took a vested estate in the devises and remainder, conditioned only that each child's share, at his death without living issue, should go to the surviving children or their heirs; and, as executory devises could bind their heirs and convey absolutely their contingent interest, a deed by such wife and children conveyed a valid title in fee.—LITTLE v. BROWN, N. Car., 36 S. E. Rep. 175.

103. WITNESSES—Impeachment—Homestead.—A witness cannot be impeached by proof of his commission of a theft, which he denies, though the objections of his counsel to his examination on such question are sustained on his admission that such fact may be shown by other witnesses for the purpose of impeachment.—WINN v. WINN, Tex., 57 S. W. Rep. 80.